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PROVINCIAL HUMAN RIGHTS LEGISLATION

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PREFACE

The present work was written with the view to provide an overview of the Provincial human rights developments which might assist those working in the field of affirmative action in Canada. The starting point is an introduction to the very notion of 'Right' itself. From this basis one attempts to highlight those legislative and jurisprudential developments which is the terrain in which affirmative action plans are growing. In recent time there has been strong indications that employers, employee organizations, public and private sector managers are not only interested in affirmative action programmes but are open to implementing plans. This situation presents new opportunities for all who are working in the field of human rights, labour development and social justice.

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INTRODUCTION

THE NOTION OF HUMAN RIGHTS

The subject matter of this present work is provincial human rights legislation in Canada. The introduction to any consideration of human rights whether from the standpoint of constitutional guaranties of rights; or specific enactments of legislative bodies; or the perspective of those who may not be fully enjoying human rights; or from whatsoever approach to the topic, should be based on a clear understanding concerning the notion of 'Right'.

Etymological definition of Human Rights

The etymological definition of the notion of human rights can be traced to the source of the term "Right". This term has its root meaning in the Latin RECTUS and the Teutonic RECHT signifying right, straight. In this sense one speaks of right as that which is straight as opposed to being crooked. According to the Oxford English Dictionary[1] the term right is rooted in Old English RIHT, RYHT; Old Frisian RIUCHT, Old Saxon, Old High German REHT, Dutch and German RECHT, Old Norse RETTR, Danish RET, Sweedish RATT.

1. One obsolete meaning was that right is the standard of permitting action within a certain sphere; law; a rule or canon.

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1. The Oxford English Dictionary, Claredon Press, Oxford Vol. VIII 1933, p. 669.

2. Further, that which is proper for or incumbent on one to do; one's duty.
3. And that which is consonant with equity or the light of nature; that which is morally just or due. (Often contrasted with might and wrong, and in Middle English frequently coupled with reason or skill.)
4. Just or equitable treatment; fairness in decision; justice.
5. In prepositional phrases, with, by or of right, rightfully, properly, with reason or justice.
6. The right; that which is right; righteousness, justice, truth; especially the cause of truth or justice.
7. Justifiable claim, on legal or moral grounds, to have or obtain something, or to act in a certain way.
8. In prepositional phrases denoting justifiable title or claim to something.
9. A legal, equitable, or moral title or claim to the possession of property or authority, the enjoyment of privileges or immunities, etc. (Frequently with qualifying word, of civil, natural, real, human.)
10. With possessive pronoun or genitive: The title or claim to something properly possessed by one or more persons. (1670 Hobbes, "Dial. Comm. Laws" (1681)37 "My Right is a Liberty left me by the law to do any thing which the Law forbids me not") (1855 MacAulay, "Hist. England" XII, III 222 "Human nature at last asserted its rights").

11. That which justly accrues or falls to anyone; what one may properly claim; one's due.

The French term 'droit' is used in translating the English work right. The United Nations Universal Declaration of Human Rights is described as the Déclaration Universelle des droits de l'homme: The term 'droit' is defined as that which is straight and direct. "Qui ne présente ni courbe ni brisure" (1) *

The Quebec National Assembly has used the term droits "de la personne" rather than droits "de l'homme". This lead was followed by the Canadian Parliament when it enacted the Canadian Human Rights Act. New Brunswick has used the United Nations terminology.

Nominal Definition

A nominal definition of a term is a definition which seeks to identify the thing to which the term being defined is applied as its proper name or denomination. One early nominal definition of right is that contained in the writings of Aristotle. "By a right we mean something twofold or equally devided, as if we said equal or just."

Aristotle explains what he means by an arithmetical example: "If 12 is divided into 9 and 3, this division would not be twofold, because the parts are unequal. To make them

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1. Dictionaire Beauchemin Canadien, Librairie Beauchemin, Montreal 1968.

*"which presents neither curve nor cracks".

equal we first have to find out the half of the dividend, which is 6. We then compare this middle number to the extremes (that is to 9 and 3), and by subtracting from the large one (9) that by which it exceeds the middle number (6), and by adding this difference or excess to the lesser number (3), we obtain two equal parts 6 and 6, that twofold or equally divide the given number (12)".

In this example we notice three things: the dividend (12), the extremes (9 and 3), and the so called middle number (6) which was used as a measure or rule to reduce the extremes to equality. For Aristotle a right is exemplified by this middle number, the act of reducing to equality the extremes is the act of justice, and the extremes reduced to equality are just, i.e. exactly equal to their measure, which is the middle number. So "Right" strictly speaking is not what is materially just or exact, but that measure that has served as a rule or criterion to make things or actions just or correct.

This is the nominal definition of "Right" according to Aristotle.(1)

Essential Definition of Right

Writers who are in the Aristotelian Scholastic tradition have little difficulty in providing an essential definition of the concept "Right". For those, however, who hold that there is nothing which is absolutely good and right, they

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1. For a detailed analysis see P.N. Zammit, "The Concept of Right According to Aristotle and St. Thomas", Angelicum, 245-266, 1954

reject the possibility of stating an essential definition of right. Writers like Pascal (1), Comte (2), Hobbes (3), Durkheim (4), Levey-Bruhl (5), down to Marx (6), are in this latter group.

Other thinkers however, hold that there does exist a basic good and right. They argue (7) for example that men at all times have regarded some actions as just and condemned others as unjust. They have not agreed still in accepting or condemning the same actions, yet they have agreed in condemning what they thought to be unjust and in accepting what they believed to be just. Therefore, all have had an idea of justice and injustice, and they have all agreed that this idea or criterion should be put in practice as the measure of human actions. It is therefore possible to discover and to formulate this existing common idea of the just and the right.

A right is something 'equal' and 'equal' is a sort of medium. Right is constituted of three elements: 1) equality, 2) due and 3) others.

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1. Pascal, "Pensées" Edition L. Brunschwegg ed XVI nos. 294, 297, 299
2. Comte "Cours de philosophie positive I p.54 (Ed. 1859)
3. Hobbes, "Leviathan" ch.6
4. Durkheim "The Division of Labour in Society"
5. Levey-Bruhl "La Morale et la Science des Moeurs" p.48, 161-2 (1903)
6. Marx "Das Kapital"
7. cf. Zammit op.cit. p.253

1. Equality: This 'equal' says Zammit is in the active sense of a measure or rule taken in the juridical order in the sense of the mean, or objective measure proper to justice.

Equality is a relation based on unity in quantity: those things in fact are said to be equal which have the same quantity. Hence equality is a sort of proportion, which is nothing else but a relation between two quantities.

A right is said to be equal in the sense of a rule measuring or commensurating what is given to what is owed, so that each one receives the exact amount to which he has a just claim.

2. Due: "Due" taken as a noun, that is objectively, is what is owed by the debtor and claimed by the creditor. If taken in the adjectival sense, it denotes the state of that measure which is due to a man, which belongs to him. A possessive pronoun such as mine, yours, her, his and so on, imply a connection between the possessor and the object possessed, in the way we speak of "my book", "my pen", etc. That belongs to someone, which is referred to him or her.

This relation is mutual, because if an object is referred to me, I am somehow referred to it as well. The mutual reference between the possessor and the thing possessed, although it is opposite, indeed because it is such, is also complementary, i.e. both terms explain each other. The mutual relation between father and child is in a sense opposite,

but precisely because it is so, one term implies and explains the other. We cannot think of a father without a child, or a creditor without a debtor, and similarly we cannot think of an owner without something owned. The relation in question is that of the thing to its owner.

3. Otherness: The third constitutive element of a right is others. Justice - whose object is right - regulates our exterior actions towards other people. And so right is only between distinct persons. Hence the third constitutive element of a right is the quality of being referred to other persons.

Other is taken in the juridical sense of independence 'sui juris', i.e. a person who is juridically independent and not subordinated to the other person from whom he claims or to whom he owes a right.

One approach to conceiving of the notion of human rights is through a linguistic analysis of the sentence in which the phrase appears. The phrase "this is mine" has as its primary function to claim a right, or to recognize rights when claimed by others ("very well this is yours"), ascribe rights whether claimed or not. ("this is his") transfers rights ("this is now yours"). "This is mine" has been traditionally regarded as primarily descriptive whereas H.L. Hart [1] argues its principle function is what he calls

1. Hart, H.L.A. "The Ascription of Responsibility and Rights" Aristotelian Society 23 May 1949 pp. 170-191

ASCRIPTIVE, being quite literally to ascribe rights in property. Ascriptive sentences resemble in some important respect the formal statements of claim and are distinguished from descriptive sentences. Such are the simple indicative sentences in which the possessive terms "mine", "yours", "his", "hers" appear as grammatical predicates. "this is mine", "this is yours", "this is his" are primarily sentences which are described as 'operative words' or 'performatory words'.

According to Hart, by the utterance of such sentences, especially in the present tense, we often do not describe but actually perform or effect a transaction; with them, we claim proprietary rights, confer or transfer such rights when they are claimed, recognized such rights or ascribe such rights whether claimed or not.

The notion of human rights has been examined by many other contemporary authors. Plamenatz (1) states that a "right is a power in the exercise of which all rational beings ought to protect a creature, either because that exercise is itself good or else a means to what is good". Later he writes that "a man (or an animal) has a right whenever other men ought not to prevent him doing what he wants or refuse him some service he asks for or needs".

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1. Plamenatz, John, "Rights", The Aristotelian Society Supplementary Volume XXIV, 1950, p.75.

Notion of Human Rights as a Claim

Lucius Garvin has written: "Rights are simply claims of individuals or of groups to certain goods and privileges such as are properly theirs in accordance with the formula for social or distributive justice".[1]
This approach sees rights as connoting a "justifiable claim". From this principle the distribution of the world's goods can be seen in a special light. The sharing in the goods around us becomes a matter of claimed rights.

In a recent article Bertram Bandman [2] argued that the concept of claims is primary and that the concept of right is secondary. He says that without claims there would be no rights. Why are claims important? Because claims enable us to exercise our rights; to stand up if necessary and demand justifiably what is our due. Indeed without claiming rights we would not have them. Bandman explains the etiology of rights in the following two stages: (1) we make claims, including claims to rights, and (2) a legal system generates rights and rules for sustaining claims.

The notion of human rights according to M.P. Golding [3]

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1. Garvin, Lucius "A Modern Introductory to Ethics", Houghton Mifflin Co. 1953 p. 479
2. Bandman, Bertram "Rights and Claims", J. of Value Inquiry vol. 7, 1973, Martinus Nighoff, The Hague 1973 pp.204 - 213
3. Golding, M.P. "Toward A Theory of Human Rights" Monist Vol. 52, 521 - 549, 1968

requires a view of the social ideal and the good life, and also requires a view of the nature of the human community.

Golding says the following essential conditions or characteristics must be present for "rights" to be possible:

1. A capacity to engage in voluntary activity
2. Desires and interests
3. A capacity to engage in purposive activity
4. A capacity to communicate demands
5. A capacity for conscious response to demands
6. The possibility of clash between demands
7. Community

According to Golding, "Right" is a forensic (forum, community) term, and its significant use required a forum of a particular kind. We cannot speak of rights existing anterior to or outside of a community. "Furthermore, rights are always 'possessed' in relation to a community. 'Right' is a forensic term, and all claimings of rights are directed to, and are made in relation to, an audience."

Golding stresses the notion of claiming because he thinks that many facets of the notion of rights is dependent on the concept of claim.

Socialization of the Notion of Right

The notion of right as a social and legal concept is explored by Lawrence Friedman [1] who examined the very

1. Friedman, Lawrence M. "The Idea of Right as a Social and Legal Concept", J. of Soc. Issues 27 (2) 1971, 189-198.

socialization of the concept of right.

Friedman observes that there are legal actions occasionally pursued in which the vindication or assertion of a right would not restore a disturbed equilibrium, but would rather effect some major social change or redistribution. Many civil liberty cases are of this order. In this context, the concept of equilibrium with regard to right would be taken in a wide view to be congruent with other notions of human rights.

Friedman is concerned about the acquisition of a claims-consciousness or consciousness of rights. He feels this is basic to understanding approaches to the legal system within a culture. Although societal norms teach and reinforce a consciousness of rights and the willingness to enforce and pursue one's rights, whether people do use the court or other societal institutes such as human rights commissions to acquire a given right, is a matter for them to decide. In particular, they must consider if they are likely to be better or worse off for bringing the case to court or to the commission, win or lose. On the civil suits side, the impulse to use law, whatever its sources, is said by Friedman to be a propensity, greater or less, to avail oneself of one's rights.

The foregoing has been an attempt to describe some of the conceptual approaches to the notion of rights. It is of significance that notwithstanding the great variety of

approaches to the philosophy of human rights, and in the face of contrary ideologies, provincial, national and international legislative assemblies have been able to express a common standard of human rights through their respective enactments.

CHAPTER II

HUMAN RIGHTS HISTORY

Precursor to Provincial Human Rights Developments

The advent of human rights legislation in the provinces of Canada is part of a development which has its origin in the very beginning of civilization. As soon as man began to band together in groups, the need for protecting the weaker members and establishing a rule that would apply to all became obvious. The great lawgivers from the time of Hammurabi to the present day have sought to protect the individual by legal means against oppression by the strong. Then, as soon as nations were formed, the need to acknowledge the dignity of the individual was felt. In China, during the 4th Century B.C., Mencius acknowledged that "the people are the most important element in the Nation". In the great age of Greece, equality before the law, equal respect and freedom of speech were the rights of citizens (although these rights were not extended to slaves). Rome enforced equal rights for its citizens and the philosophers Cicero and Seneca went beyond legal tradition and asserted that "All men are free by nature". All the great religions of the world emphasize the dignity and worth of the human person. Hinduism teaches that there are "kingly obligations" to the common man. The Hebrew and Christian religions recognize the rights of the individual in society, while in the Islamic tradition, each

individual can claim the right to brotherhood and to justice.

The history of freedom is marked by a number of outstanding documents. In 1215, the barons of England rose up and forced the tyrannical King John to sign the Magna Carta, one of the most important clauses of which stated that no man should be imprisoned or put to death without a fair trial. In 1679, the Habeas Corpus Act, also passed in Britain, required that the person held in custody be brought up for trial, while ten years later the Bill of Rights gave British subjects the right to petition the King, made it illegal to suspend laws and laid down that Members of Parliament should be freely elected. The American Declaration of Independence, in 1776, declared: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness". A few years later in 1789, the French Declaration of the Rights of Man stated that: "Men are born free and equal in rights. No person shall be accused, arrested or imprisoned except according to the law. Every citizen may speak write and print with freedom, within the law".

In Canada, the development of human rights can be foreseen in the British North America Act of 1867 (Imp. 30, Vict., c. 3). Section 92 of the B.N.A. Act provides that the

provincial legislatures have the jurisdictions to make laws concerning such things as municipal bodies, licenses, the administration of justice and property and civil rights. There is no express guarantee of fundamental civil and political rights in the Canadian constitution, that is, there is nothing similar to the First Amendment of the Constitution of the United States. This should not be interpreted to mean that the Canadian constitution is completely void of protections for rights. One finds, for example, the preambular statement in the B.N.A. Act which underscores the desire of the provinces to federate "with a constitution similar in principle to that of the United Kingdom". On several occasions the courts have protected rights by appeal to this proposition.

With regard to certain economic, social and cultural rights we find Section 93 of the B.N.A. Act proscribing the legislatures from taking action that would affect prejudicially any right or privilege with respect to denominational schools which existed at the time of confederation. Language rights are also provided for by Section 133 of the Act, affording the right to use either French or English in Parliament.

History of the Protection of Human Rights by the Courts

The history of the action of Canadian courts for the protection of human rights is less than impressive. Whether

addressing itself to matters which come before it in regard to constitutional, civil or common law, the Canadian judiciary did not adopt a pioneering stance during the first century of the nation's life.

We find an early example of the court's attitude with regard to racial equality in the case of Union Colliery v. Bryden (1899) A.C. 580. In this case, the court did not address itself to the egalitarian question but rather only the constitutional question. The issues arose as a result of a challenge to British Columbia legislation which prohibited Chinamen from working in B.C. mines.

One of the earliest cases to deal with the right of accommodations, services or facilities notwithstanding race, was that of Sparrow v. Johnson (1899), 8 B.R. 379. In this case a black couple were refused permission to take their reserved seats in the orchestra section of a theatre. The court awarded damages for breach of contract because according to the judge, the reserved seat arrangement produced a binding contract for seats in question. Although the judgement of the lower court also based its decision on the principle of equality, the court of appeal based its decision only on the breach of contract grounds.

In Cunningham v. Tomey Homma (1903) A.C. 151 the Judicial Committee of the Privy Council held that the policy expressed by a provision in the British Columbia Elections

Act denying the right to vote to "Chinamen, Japanese and Indians" is not a topic which their Lordships are entitled to consider.

Shortly before World War I the Supreme Court of Canada, in the case of Quong-Wing v. The King (1914) 49 S.C.R. 440, upheld the validity of a Saskatchewan Act which forbade white women from residing or working in "any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman".

Shortly after World War I, a case similar to Sparrow took place also in Montreal. In Loew's Montreal Theatres Ltd. v. Reynolds (1919) 30 K.B. 459 the Court upheld that where a theatre sells general admission tickets, there is no contract for particular seats, therefore, the management of the theatre could make regulations requiring blacks to sit only in the balcony. Justice Lamothe stated that:[1] "chaque propriétaire est maitre chez lui; il peut, à son gré, établir toutes regles non contraires aux bonnes moeurs et à l'ordre public". Thus, it was held that it was not contrary to public order and good morals to so discriminate against blacks.

In 1942 in the case of Franklin v. Evans (1924), O.L.R. 349, a black found sympathy, but no legal right from an Ontario court when he was refused service by a restaurant because of his color. The court held that a restaurant keeper was like the proprietor of a department

1. Trans. (Each proprietor is the master of his own establishment, he is able to establish whatever rules he likes so long as they are not contrary to public morals and order.)

store and can choose his customers, unlike the inn keeper.

This traditional position was perpetuated in a clasical human rights case which ended with a decision of the Supreme Court of Canada. This case was Christie v. The York Corporation (1940) S.C.R. 139 Supreme Court of Canada.

The appelant, a Negro, held season tickets for hockey games at the Montreal Forum. Prior to a hockey game, he went into the forum with two friends for a drink where he was refused service because he was "coloured". The appelant telephoned the police and in the presence of two police officers and seventy customers, the manager reiterated his refusal to serve the appelant because of his colour.

The appelant brought action claiming $200 for breach of contract and in tort for "humiliation". The trial judge upheld his claim and awarded $25 for damages. This judgement was set aside and his action dismissed by the Quebec Court of King's Bench. On appeal to the Supreme Court of Canada the appeal was dismissed.

Justice Rinfret speaking for the majority of the Court held: "The respondent alleged that in giving such instructions to its employees and in so refusing to serve the appellant it was well within its rights; that its business is a private enterprise for gain; and that, in acting as it did, the respondent was merely protecting its business interests.

... In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of that principle, the adoption of a rule contrary to good morals or public order.

... It cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order.

... The appeal ought to be dismissed with costs."

Justice Davis in his dissenting opinion stated: "In the changes and changing social and economic conditions, different principles must necessarily be applied to new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the state enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom

of the merchant to do as he liked has in my view no application to a person to whom the State has given a special privilege to sell to the public.

If there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the legislature itself, in my view, to impose such prohibitions..."

In Rogers v. Clarence Hotel Company Ltd. (1940) 2 W.W.R. 545, 3 D.L.R. 583 (B.C.C.A.), involving a refusal by a British Columbia tavern to serve a black, the Franklin decision was confirmed on all points. Also this case held that the principles established by the Supreme Court of Canada in the Christie decision were not confined to the civil law of Quebec but were also applicable to the common law provinces.

According to Robert Kerr (1) "No Canadian case deals explicitly with racial discrimination by the common law inn, but dicta in both the Franklin and Rogers cases foreshadow the English decision in Constantine v. Imperial London Hotels Ltd. (1944), 2 All C.R. 171 (K.B.) This case held that refusal of accommodations solely on the basis of colour by a hotel was a legal wrong affording relief in damages. This decision is probably the law in Canadian common law jurisdictions.

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1. Kerr, Robert "Legislation Against Discrimination in Canada" New Brunswick Human Rights Commission, 1975. p.4

The mid forties saw another important human rights case considered by the courts. The case of Re Drummond Wren (1945) O.R. 778, (1945) 4 D.L.R. 674 (H.C.) seems to question the common law acceptance of private discrimination.

The case involved an application made by Mr. Drummond Wren, a purchaser of certain lands in York County, to have a restricted covenant attached to the sale of this property reading: "Lands not to be sold to Jews or persons of objectionable nationality", declared invalid.
MacKay J. (Ontario High Court)

"... The applicant's argument is founded on the legal principle, briefly stated in 7 Halsbury, 2nd ed. 1932, pp. 153-4, that: 'Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy.' Public policy, in the words of Halsbury, 'varies from time to time'.

In "The Growth of Law", Mr. Justice Cardozo says: 'Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth.'

And Mr. Justice Oliver Wendell Holmes, in "The Common Law", says: 'The very considerations which judges most rarely mention and always with an apology are the secret

root from which the law draws all the juices of life. I mean of course what is expedient for the community concerned.

... First and of profound significance is the recent San Francisco Chapter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The preamble to this Charter reads as follows:

'We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...and for these ends to practice tolerance and live together in peace with one another as good neighbors...'

Under acticles 1 and 55 of this Charter, Canada is pledged to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

In the Atlantic Charter, to which Canada has subscribed, the principles of freedom from fear and freedom of worship are recognized.

Section 1 of the Racial Discrimination Act, supra, provides: 'No person shall, (a) publish or display or cause to be published or displayed; or (b) permit to be published

or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.'

...Proceeding from the general to the particular the argument of the applicant is that the impugned covenant is void because it is injurious to the public good. This deduction is grounded on the fact that the covenant against sale to Jews or to persons of objectionable nationality prevents the particular piece of land from ever being acquired by the persons against whom the covenant is aimed, and that this prohibition is without regard to whether the land is put to residential, commercial, industrial or other use. How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots of subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land

can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or, conversely, would exclude particular groups from particular business or residential areas. The unlikelyhood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.

Ontario, and Canada, too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forced of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy,

I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

My conclusion therefore, is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.

...An order will therefore go declaring that the restrictive covenant attacked by the applicant is void and

of no effect."

As indicated previously, Section 92 of the B.N.A. Act gives the province jurisdiction to make legislation in the area of human rights. Below we shall briefly trace the exercise of that jurisdiction. However, first let us look at the progress made in human rights through the Canadian courts.

In Nova Scotia in 1947 R. v. Desmond (1947) 4 D.L.R. 81 (N.S.C.A.) a case involving a petition of 'certiorari' which was granted, nevertheless one justice indicated that a black woman who had sought to sit in the orchestra section of a theatre, when blacks were only allowed to sit in the balcony, might have been provided with relief had the case been heard.

In Noble and Wolf v. Alley (1951) S.C.R. 64, (1951) 1 D.L.R. 321 once again sees the courts avoid the question of whether racial discrimination by itself would invalidate covenants which had racial restrictions. Indeed, the lower court held that the restrictive covenant prohibiting the sale of land to any person of a "Jewish, Hebrew, Semetic; Negro or coloured race or blood" was upheld as valid. The Ontario Court of Appeal concurred and held that there were no grounds of public policy to render such covenants void.

Tarnopolsky [1] writes that "Before the case reached the Supreme Court of Canada, the legislatures of both Ontario

1. Tarnopolsky, W.S. (unpublished manuscript)

and Manitoba passed amendments to their property legislation providing that such covenants were invalid. Despite this further evidence of the view of the legislatures as to what was public policy with respect to racial discrimination and restrictive covenants, the Supreme Court did not choose the egalitarian route but rather held the covenant invalid on the basis that it did not relate to the use of land and was also void for uncertainty".

An important human rights case in the fifties in that of John Murdock Limitée v. La Commission des relations ouvieres (1956) C.S. 30 which involved the certification of a labour union by the Quebec Labour Relations Branch on the basis of a majority vote of the company's workers, but not including Indians who constituted nearly one-third of the workforce.

In Gooding v. Edlow Investment Corporation (1966) C.S. 436, the plaintiff had concluded an oral lease over the telephone but this was repudiated by the landlord when he discovered that the prospective tenant was black. The plaintiff sued and was awarded damages not only for breach of contract but also delictual damages in the amount of $300 for moral injuries. The award was not made specifically on the grounds of racial discrimination notwithstanding that Mr. Justice Nadeau held that acts of racial discrimination were illegal because they were contrary to public order and good morals.

In Roger Morris v. Les Projets Bellevue Ltee. (1968) P.C.M. 100, 584, 15 mcGill L.J. 112 again the Quebec Court awarded damages in delect for "moral debasement" suffered by the plaintiff because of racial discrimination.

It would appear that these decisions in the civil law province is now making more clear that racial discrimination is no longer tolerable, and that the concept of public order and good morals has developed since Christie v. York Corporation. Thus we find in the case of Phillipe Beaubeu et Cie v. Canadian General Electric (1970) 30 C.P.R. (2d) 100 the court stating: "Quoi qu'il en soit, on peut aisement se figurer que les standards de conduit de 1940 ont singulierement évolué depuis, et que ce qui pouvait être acceptable à cette epoque ne le serait plus aujourd'hui la notion d'ordre public evoluant avec le cours des ans".[1]

One might argue therefore that there is now a basis in Quebec jurisprudence to consider racial discrimination as being contrary to public order and good morals. That is, acts of racial discrimination are more clearly subject to suit for damages in delict. However, what is uncertain is to what extent discrimination based on other grounds such as sex or age or physical disability would be illegal.

"It is no wonder", says Tarnopolsky [2] "that the provincial legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination

1. trans. "In any case, it is easy to imagine that the standards of conduct of 1940 have since evolved, and that what would have been acceptable in that period would no longer be today, for the notion of public order has evolved in the course of years".

2. Tarnopolsky ibid. p. 9.

legislation, the administration and application of which has been largely taken out of the courts".

History of Anti-Discrimination Legislation in Canada

The forerunner of Canadian provincial and federal human rights legislation has been principally the various fair practices laws enacted between World War II and the early sixties. Those who have traced human rights legislation to pre-confederation times [1] cite An Act to Prevent the Further Introduction of Slaves and to limit the term of enforced servitude within this Province, passed in 1793 by the first legislative assembly of the Province of Upper Canada. This statute provided that the children of slaves be set free upon their reaching the age of twenty-five. In 1833, the Emancipation Act passed by Parliament in England finally abolished slavery completely.

It is the early 1930's which first saw isolated pieces of legislation enacted proscribing discrimination. In 1931 the British Columbia Unemployment Relief Act, S.B.C. 1931, c. 65 provided that employment on funded projects could not allow discrimination because of "political affiliation". During 1932 the Province of Ontario amended the Insurance Act, wherein discrimination by unfair costing of insurance risk "because of the race or religion of the insured was forbidden". This same year witnessed the British Columbia

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1. Tarnopolsky, W.S. "The Iron Hand in the Velvet Glove", (1968) 46, Can. Bar Rev., 565-90 at p. 567

Legislature enact another Unemployment Relief Act S.B.C. 1932, c 58 which provided that "in no case shall discrimination be made or permitted in the employment of any person by reason of their political affiliation, race or religious views".

In 1933, a further Unemployment Relief Act, 1933, c. 71 was passed in British Columbia which contained the former anti-discrimination provision and provided that where federal funds were used to pay part of the cost of placing families on land for farming, "the selection of families shall be made without discrimination by reason of political affiliation, race or religious views".

In 1934 the Manitoba Legislature amended the Libel Act, S.M. 1934, c. 23 providing that "the publication of a libel against a race or creed likely to expose persons belonging to a race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people" was actionable as a libel.

The period between the end of World War II and the beginning of the fifties was marked by two very significant legislative developments which pioneered anti-discrimination legislation in Canada. The first was the enactment by Ontario of the Racial Discrimination Act in 1944 (Stats Ont 1944, c. 51), which proscribed the publication, displaying of material or broadcasting of anything indicating an intention

of racial or religious discrimination. The second development was the passage of the Saskatchewan Bill of Rights Act in 1947. (11 Geo. VI, S.S. 1947, c. 35). This statute, in the form of a prohibitory penal statute, proscribed discrimination in a number of areas and covered many areas of civil liberties.

Commenting on these two enactments of the late forties Tarnopolsky [1] points out that they were both "...quasi-criminal statutes in that certain practices were declared illegal and sanctions were set out. The experience in the United States in the twentieth century, and in Canada since World War II, has been that this form of protection, although better than none, is subject to a number of weaknesses. There is reluctance on the part of the victim of discrimination to initiate the criminal action. There are all the difficulties of proving the offence beyond a reasonable doubt, and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one. There is reluctance on the part of the judiciary to convict, probably based upon a feeling that a discriminatory act is not really in the nature of a criminal act. Without extensive publicity and promotion, many people are unaware of the fact that human rights legislation exists. Members of minority groups who have known discrimination in the past, tend to be somewhat skeptical as to whether the legislation

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1. Tarnopolsky, ibid. p. 568

is anything more than a sop to the conscience of the majority. Finally, the sanction in the form of a fine, does not really help the person discriminated against in obtaining a job or home or service in a restaurant".

The 1950's was marked by a flurry of fair practices legislation in the area of employment and accommodation.

Fair Employment Statutes of 1950's

Year	Jurisdiction	Statutes
1951	Ontario	Fair Employment Practices Act, S.O. 1951, c. 24
1953	Federal	Canada Fair Employment Practices Act, 1953, c. 19
1953	Manitoba	The Fair Employment Practices Act, R.S.M. 1954, c.81 as amended by 1956, c. 20
1954	Federal	Fair Wages Policy of the Government of Canada, 1954, P.C. 1954-2029
1955	Nova Scotia	Fair Employment Practices Act, S.N.S. 1955, c. 5
1955	Federal	Unemployment Insurance Act, 1956, c. 38
1955	Alberta	The Alberta Labour Act, Part VI, R.S.A., 1955, c. 157 as amended by 1957, c. 38, s.41 (Equal Pay Legislation)
1956	New Brunswick	Fair Employment Practices Act, S.N.B. 1956, c.9
1956	Saskatchewan	The Fair Employment Practices Act, R.S.S. 1956, c.69 as amended by 1959, c.28

1956	British Columbia	Fair Employment Practices Act, S.B.C. 1956, c.16
1956	Federal	Female Employees Equal Pay Act, 1956, c.38
1959	P.E.I.	The Equal Pay Act, S.P.E.I.1959, c.11

Fair Accommodations Statutes of 1950's

Year	Jurisdiction	Statutes
1954	Ontario	Fair Accommodation Act, S.O. 1954, c.28
1956	New Brunswick	Fair Accommodation Practices Act, S.S. 1956, c.69
1959	Nova Scotia	Fair Accommodation Act, S.N.S. 1959, c.4

The decade of the 60's belongs to human rights legislation. Beginning with the Province of Ontario in 1962 we have the first contemporary Human Rights Code (S.O., 1961-62, c.93). This was followed in 1963 by Nova Scotia which enacted the Nova Scotia Human Rights Act (S.N.S., 1963, c.5), which was enforced by a Human Rights Commission as of 1967. The Province of Alberta passed human rights legislation in 1966 in the form of the Alberta Human Rights Act (S.A., 1966, c.39) New Brunswick was the second province to establish a Human Rights Commission to administer the New Brunswick Human Rights Act in 1967 (S.N.B., 1967, c.13). In 1968, P.E.I. became the fifth jurisdiction in Canada to pass a Human Rights Act. Within the next five years all provinces had enacted human rights laws and provided for its administration.

As of January 1, 1980 the following statutes apply to human rights in Canada:

	Acts
Federal	Canadian Human Rights Act, S.C. 1976-77 c.33; as amended 1977-78, c.22
Alberta	The Individual's Rights Protection Act, S.A. 1972, c.2; as amended 1973, c.61; 1978, c.51
British Columbia	Human Rights Code of British Columbia, S.B.C. 1973, c.119; as amended 1974, c.87 and c. 114
Manitoba	The Human Rights Act, R.S.M., c.H175 enacted by S.M. 1974, c.65; as amended 1975 c.42; 1976 c.48; 1977, c.46; 1978, c.43
	Employment Standards Act, R.S.M. 1970 c.E110; as amended 1970, c.48; 1971, c.82; 1972, c.52; 1974, c.59; 1975, c.20; 1976, c.33 and 65; 1977, c.50 and 56; 1977 (2nd) c.5
New Brunswick	Human Rights Code, R.S.N.B. 1973, c.H-11, as amended 1974, c.20 (Supp); 1976, c.31; 1979, c.41
Newfoundland	The Newfoundland Human Rights Code, R.S.N. 1970, c.262; as amended 1973, Act. No. 34; 1974, Acts Nos. 57 and 114; 1978, c.35
Nova Scotia	Human Rights Act, S.N.S. 1969, c.11; as amended 1970, c.85; 1970-71, c.69; 1972, c.65; 1974, c.46; 1977, c.18 and c.58
	Labour Standards Code, S.N.S. 1972, c.10; as amended 1974, c.29; 1975, c.50; 1976, c.41; 1977, c.18 and c.68; 1978, c.42
Ontario	The Ontario Human Rights Code, R.S.O. 1970, c.318; as amended 1971, c.50, s.63; 1972, c.119; and 1974, c.73
	The Employment Standards Act, 1974, S.O. 1974, c. 112; as amended 1978, c.2

Prince Edward Island	Human Rights Code, S.P.E.I. 1975, c.72, as amended 1977, c.39
Quebec	Charter of Human Rights and Freedom, S.Q. 1975, c.6 as amended 1976, c.5; 1977, c.6; 1978, c. 7
	Rights of Handicapped Act, S.Q. 1978, c.7
Saskatchewan	Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1 (1979)

IMPACT OF INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS ON CANADA

The International Labour Organization (ILO)

The development of human rights legislation in Canada was part of the generally developing concern with rights issues internationally. The early vestiges can be seen to flow from the contributions which were made by the ILO which was founded in 1919. The involvement of Canada in the ILO work, especially the conventions, had an effect domestically. It was necessary to determine the nature of these conventions with reference to federal and provincial spheres of jurisdiction. Since the 1960's recognition has been given to the constitutional validity of the federal government's ability to ratify conventions even though compliance depended on necessary legislation being enacted by the provinces.

Canada has ratified a number of the ILO conventions including the important conventions which treat of discrimination in employment.

The United Nations

The Second World War stimulated new efforts in the area of human rights not only in Canada but all over the world. Canadians sharing the hardships of the war years, yet working together for victory with peoples of other countries, became more aware of the partnership of the human race. All were shocked that millions could be dragged from their homes, tortured and killed - that they could lose all human rights so easily. All began to realize that denial of these rights was a basic cause of war. Allied leaders insisted that the foundations of peace must be built upon respect for human rights. Thus, the "Atlantic Charter" of 1941 expressed the hope that peace would be based on the four freedoms: freedom of speech, freedom of worship, freedom from want, and freedom from fear. The conferences held at Washington (1942), Moscow and Teheran (1943) and Dumbarton Oaks (1944) all gave assurances that respect for human rights would play a large part in the future.

The Charter of the United Nations refers to human rights in the preamble and six different articles. Thus a new development became apparent in the area of human rights. Now it was felt that the promotion and protection of human rights had even become an international responsibility. Therefore, the United Nations decided to draft an international bill of rights which would apply to everyone,

everywhere. An eighteen member commission on human rights was established by the United Nations in 1947 and was entrusted with the task of preparing recommendations on:

(a) an international bill of rights;

(b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;

(c) the protection of minorities;

(d) the prevention of discrimination on grounds of race, sex, language or religion, and

(e) any other matter concerning human rights.

Under the chairmanship of Mrs. Franklin D. Roosevelt, the Commission drafted the Declaration on Human Rights and on December 10, 1948, the United Nations General Assembly proclaimed the "Universal Declaration of Human Rights".

The impact of this development provincially can be illustrated in the case of Re Drummond Wren (1945) O.R. 778, 4 D.L.R. 674 in 1945 where the Ontario High Court held invalid a covenant restricting the sale of land along racial lines, on the ground that the covenant contravened public policy. As evidence of public policy the court cited among other things, the United Nations Charter, and the Atlantic Charter.

There is direct reference to the Universal Declaration in several pieces of human rights legislation in Canada today. Illustrative are the Acts of Prince Edward Island and

Ontario.

Presently, a number of United Nations Human Rights instruments have an impact on the provinces in terms of education and development. The provinces through collaboration with the federal government are responding to requests from the Secretary-General of the United Nations for various reports on the state of human rights in Canada.

Of greatest importance are the 1966 International Covenants which Canada ratified in 1976. These are: The International Covenant on Civil and Political Rights; The Optional Protocol to the International Covenant on Civil and Political Rights; and The International Covenant on Economic, Social and Cultural Rights.

CHAPTER III

AN OVERVIEW OF ANTI-DISCRIMINATION PROVISIONS

Purpose of Legislation

The purpose of provincial human rights legislation is:

(1) to give legislative recognition to certain egalitarian rights

(2) to proscribe discrimination on the basis of a number of grounds in given areas of human relations.

(3) to provide for enforcement machinery of the anti-discrimination legislation

(4) to establish an agency that is charged with the responsibility for education, research and development of programs for the promotion of human rights.

The preamble to the human rights acts in the following provinces indicate the general background and purpose of the Act: Alberta, Ontario, Quebec, New Brunswick, Nova Scotia, P. E. I. Reference is made to the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. In Ontario the preamble states that it is "public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed...etc."

The preamble to the Quebec Charter of Human Rights and Freedoms also underscores the principles that the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being.

The P.E.I. Act states in the preamble that "it is deemed desirable to provide for the people of the province a Human Rights Commission to which complaints relating to discrimination may be made".

Another important purpose of human rights legislation is contained in the following article of the preamble to the Nova Scotia Act:

"And in recognition that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in Nova Scotia is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons".

The preamble to the New Brunswick Human Rights Code points out that ignorance, forgetfulness, or contempt of the rights of others are often the causes of public miseries and social disadvantage.

The legislation proscribes discrimination on a number of specific grounds. Consequently, the human rights acts are anti-discrimination statutes dealing with egalitarian human rights.

The model developed in Canada for the enforcement of the human rights statutes is the commission model. The various jurisdictions have some differences in structure; however, the functional or operational style is similar across the land. There is a commission that is usually composed of lay men and women with a chairperson or chief commissioner. This latter person is either a full-time or a part-time commissioner. In Quebec and Canada the head of the human rights commission has the protection of the legislators in terms of removal from office.

The administration of the Human Rights Act by the Commission is the responsibility of either the Minister of Justice, the Attorney-General, the Minister of Labour, or a Minister specifically designated by the Executive Council of the government.

Prohibited Acts of Discrimination

Provincial human rights legislation prohibit discriminatory acts in a number of specified areas on stated grounds. The prohibited acts are in such areas as:

(1) Publications of notices, signs, symbols, advertisements

(2) Discrimination in public places

(3) Discrimination in housing accommodations

(4) Discrimination in trade union membership

(5) Discrimination in self-governing professions and associations

(6) Restrictive contracts, conveyances

(7) Discrimination in employment

Publication of Notices, Signs, Symbols, Advertisements

Each provincial human rights commission administers legislation prohibiting the publication of discriminatory notices, signs, or advertisements. These provisions are not meant to limit the free expression of opinion.

Discrimination in Public Places

Human rights legislation prohibiting discrimination on stated grounds in the area of public accommodations, services, and facilities has its history in the fair accommodation law of the 1950's. All jurisdictions now have anti-discrimination provisions dealing with public places in the respective human rights legislation.

The kinds of complaints received by the human rights commissions under this section cover a wide spectrum of matters. Cases involve the denial of hotel or motel accommodations to native persons and to other visible minorities on the one hand and the denial of admission to taverns, cabarets, night-clubs, restaurants on the other hand.

Discrimination in Housing

Confronting discrimination in housing is one of the major areas of concern for human rights commissions. Insofar as there are many kinds of housing or dwelling settings ranging from apartment rental, through condominium purchase to single home acquisition, the administrators are kept very active.

ILLUSTRATION

Gounds of Discrimination in matters of publication of notices, signs,symbols, advertisement[1]

JURISDICTION PROVINCE	RACE	RELIGION	COLOUR	SEX	MARITAL STATUS	AGE	ANCESTRY	PLACE OF ORIGIN	POLITICAL BELIEF	NATIONALITY
BRITISH COLUMBIA	X	X	X	X	X	45-65	X	X	X	
ALBERTA	X	Religious Beliefs	X	X		45-65	X	X		
SASKATCHEWAN	X	Creed & Religion	X	X			X	X		X
MANITOBA	X	X	X	X	X	X				X
ONTARIO	X	Creed	X	X	X		X	X		X
QUEBEC	X	X	X	X	Civil Status				Political Convictions	
NEW BRUNSWICK	X	X	X	X	X	19 and over	X	X		
NOVA SCOTIA	X	Religion & Creed	X	X	X	40-65				
PRINCE EDWARD ISLAND	X	Religion & Creed	X	X	X	18-65			X	
NEWFOUNDLAND	X	Religious Creed & Religion	X	X	X				Political Opinion	

1. Updated to January 1980

ILLUSTRATION Jan. 1, 1980

Grounds of Discrimination in matters of publication of notices, signs, symbols, advertisement

JURISDICTION PROVINCE	ETHNIC OR NATIONAL ORIGIN	SOURCE OF INCOME	FAMILY STATUS	PHYSICAL HANDICAP	LANGUAGE	SOCIAL CONDITION	SEXUAL ORIENTATION	
BRITISH COLUMBIA								
ALBERTA								
SASKATCHEWAN				Physical Disability				
MANITOBA	X	X	X	X				
ONTARIO								
QUEBEC	X			X	X	X	X	
NEW BRUNSWICK	National Origin			Physical disability				
NOVA SCOTIA	X			X				
PRINCE EDWARD ISLAND	X			X				
NEWFOUNDLAND	Ethnic, National or Social Origin							

Conclusion

Provincial human rights commissions are required to give a significant part of their resources to the enforcement of the anti-discrimination in housing laws. Rentals of apartments tend to be a major area of racial discrimination throughout Canada. Often the Commissions are faced with systemic or institutional discrimination in the real estate system. The effect of rental systems which use such devices as nomination by tenants or caution fees is often to exclude classes of persons. Pricing which takes ethnic composition of a neighborhood as a factor is another problem area.

Clubs, Restrictive Memberships

Provincial human rights legislation attempts to provide redress to those who suffer discrimination by private clubs and associations. In all jurisdictions the commission has at least a moral responsibility to combat discrimination practiced by the private club. The present human rights legislation seems to be in favour of the private club and rests on the principle of freedom of association.

One of the major problems confronted by a human rights commission is the situation created where it becomes apparent that under the guise of being a "private club" an establishment is contravening the basic principles and spirit

of human rights legislation.

The legislation does not directly mandate a human rights commission to reach a determination on the question of whether or not the alleged violator is a "genuine" or "bona fide" private club. Rather, the commission must direct their attention to the narrower question of whether the establishment is one that customarily admits the public.

Evidence that can be used by a human rights commission in deciding that an establishment is one to which the public is customarily admitted can include the following:

(1) On what basis is the selection of members made?

(2) Is a distinct and specific interest being promoted, fostered or developed through the club's activities?

(3) Does membership acceptance involve approval by existing members and/or a board of directors of the club?

(4) Does the club advertise for membership?

(5) Is the club profit-making?

(6) Does the club admit guests and if so what is their guest policy?

(7) Who is in control of the management and direction of the club?

American courts have addressed themselves to the question of what constitutes a 'bona fide' private club:

Solomon v. Miami Woman's Club 359 F. supp. 41 (1973)

Moose Lodge No. 107 v. Irvis (1972), 407 US 163

Tillman v. Wheaton Haven Recreation Association Inc. 93 s. ct. 1090 (1974)

Olzman v. Lake Hills Swim Club, Inc. 495 F. 2d 1333 (1974)

Wright v. Cork Club, 315 F. supp. 1143

Daniel v. Paul, 395 US 298

Commenting on this aspect of human rights legislation, Professor Ian Hunter has written [1] that it represents one of the most unfortunate loopholes in human rights legislation. The absence of a provision dealing specifically with private clubs relates to a twofold problem: (1) membership; and (2) admission of non-members to social events on club premises.

The Race Relations Act in the United Kingdom has been used to address this question. In Charter v. Race Relations Board (1973)All E.R. 512, 516 an Indian who was refused membership in the Eastham Conservative Club because of his colour and race sought redress for the discrimination he suffered. The British Court ruled that the Association was not a public club because membership was had by being personally selected.

There is no public element where a personally selected group of people meet in private premises and the club which they constitute does not provide facilities or services to the public or any section of the public...

But a clear dividing line does emerge if entry to a club is no more than a formality. This may be because the

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1. Hunter, Ian "The Development of the Ontario Human Rights Code: A Decade in Retrospect" In: (1972), 22 University of Toronto Law Journal 237, at 252

club rules do not provide for any true selection or because in practice the rules are disregarded.

The results in Docker's Labour Code and Institute v. Race Relations Board (1976) A.C. 285, were effectively the same as the Charter.

It would appear that much work needs to be done in this area in order to further the goals of egalitarianism in public policy and yet protect the rights of association.

CHAPTER IV

THE PROHIBITED GROUNDS OF DISCRIMINATION

The prohibited grounds of discrimination varies to some degree from province to province. However, for the purpose of affirmative action programmes, we focus on selected variables: race, age, religion, handicap, marital status, and sex.

Race

Race is a prohibited ground of discrimination in every human rights act in Canada, however, none of the acts provide a definition of race. The House of Lords stated in Ealing London Borough Council v. Race Relations Board (1972) A.C. 342, that "race" cannot be considered a term of law with a clear standard definition. We must therefore look to the fledgling jurisprudence of Boards of Inquiry established under human rights law. In the case of Ali v. Such, a Board of Inquiry in 1976 established under the Alberta Individual Rights Protection Act, the Board attempts a definition of race. Having examined dictionary definitions of race the Board concluded that race indicates broad or great divisions between mankind, and that races have physical pecularities

that distinguish one race from another. Thus, the colour of ones' skin is a physical characteristic of race.

The principle concern for human rights workers is what the respondent perceives the complainant to be. Thus, if an individual is of dark complexion but not of the given race perceived by a respondent, the discrimination that occurs is still discrimination on the basis of race or colour. Boards of Inquiry in Canada have recognized the various terms and phrases which describe racial discrimination in the different human rights acts. Thus, it is a matter of racial discrimination when the discrimination was on the grounds of "race" alone, or "race or colour" or "race and ancestry", or "race, colour and place of origin".

Characteristics by which complainants are described or describe themselves (1)	Cases - (a few examples, not a complete list
"Native Indian"	Weaselfat v. Driscoll, (Alta., 1972) D. Bind v. Duck Mountain Motor Hotel (Sask., 1974) Sam v. Tymchin (B.C., 1976) Bill v. Young (B.C. 1977) Turner v. P.A. Pulp Co. Ltd. (Sask., 1974) Greyeyes v. Charneira (Sask., 1975)
"Indian ancestry...quarter-breed Indian"	Tomkins v. Kyryliuk (Ont., 1971)
"Black" or "Black from Jamaica" or "from Trinidad" or "Black from West Indies" etc.	Hayes v. Central Hydraulic Manufacturing Ltd. (Alta., 1973) Warner v. City of Halifax (N.S., 1972) St. Hill v. Grishin (Ont. 1970)

1. source Tarnopolsky, (unpublished manuscript)

	Williams v. Ouellette (Ont., 1973) Jones v. Huber (Ont., 1976)
"Negro" or "Canadian Negro", etc.	Mitchell v. O'Brien (Ont., 1968) Walls v. Lougheed (Ont., 1968) Harris v. Bouzide (Ont., 1971) Planter v. Metropol Supper Club (Ont., 1972)
"Trinidadian of East Indian descent"	Deomaraj v. Zvonko (Ont., 1975)
"East Indian Origin"	Kahn v. Preshel (B.C., 1975)
"Indian origin, Chinese origin Japanese origin" (3 joing complaints)	Ahmad and 2 others v. City of Toronto (Ont., 1972) (race, colour, place of origin)
"Complainants originally from India"	Vijay v. City of Regina (Sask., 1973) (race, colour, and place of origin and ancestry)

Racial discrimination occurs, therefore where differential treatment is related to the respondent's identification of the victim with a given group characterized by racial cues.

Age

The proscription of discrimination because of age varies from jurisdiction to jurisdiction. The definition of age is not constant, nor are the areas in which age discrimination are prohibited. In some jurisdictions age is defined as the age of majority and over, with no upper limit. In other statutes age is defined to be those years falling within a certain range.

With reference to employment, a number of exceptions need to be noted. The application of age is limited where there is operating a 'bona fide' pension, retirement or insurance plan. (B.C., Alberta, Manitoba, N.B., N.S., P.E.I. Nfld.) However, this exception needs careful examination, insofar as it need not necessarily mean that simply because a pension plan is in operation at a place of employment, the anti-age discrimination provisions of human rights acts do not operate. This matter was considered by the Board of Inquiry in the case of Hadley v. The City of Mississauga 1976, where Chairman Lederman concluded that the exceptional clause to the effect that "any 'bona fide' superannuation or pension fund or plan or any 'bona fide' insurance plan is not to be affected by the requirement of non-discrimination. According to Lederman, the purpose of the employee benefit plan exception was to permit employers to discriminate against older employees by not enrolling them in pension or retirement plans, or by providing reduced benefits due to fewer years of employment. Otherwise the cost of such plans would discourage employers from adopting or retaining them. In this way the human rights code does not condone compulsory retirement before the age of 65 even if tied to a pension plan but merely permits discrimination with respect to participating in, and the benefits accruing from the plans.

A clear distinction must be drawn between "retirement date", i.e. the date at which employment ceases, and "pensionable date", i.e. the date at which pension is available.

The second important consideration relating to age discrimination legislation is the excepting provisions contained in the legislation based on a "bona fide occupational requirement".

The New Brunswick Human Rights Act allows for the exception based on a 'bona fide' occupational requirement as determined by the Human Rights Commission. Other legislation does not specify who is to make the determination. In a number of leading American cases it has been established that the burden of persuasion for the "bona fide" occupational qualification as being a defense, clearly rests with the employer. (cf. Usery v. Tamiami Trail Tours Inc., 531 f. 2d. 224, 233-34 (1976) Hodgson v. Greyhound Lines Inc., 449. f. 2d. 859, 861-63 (1974))

The leading Canadian cases are Little v. Saint John Shipbuilding and Drydock Co. Ltd., (N.B. 1980), Hadley v. Mississauga (1976), Cosgrove v. North Bay (1976), and Hall and Gray v. International Firefighters Association, Local 1137 and Borough of Etobicoke Fire Department (1977). These cases are Boards established under the New Brunswick and Ontario Human Rights Codes where the exception to age is provided because of a 'bona fide' occupational qualification. It was

the Board which had to decide whether or not the defense of bona fide qualification argued by the respondent was valid. In the Cosgrove case the Board found it was, in the other two cases that it was not. In reaching the decision the Commission (N.B.) or the Board may wish to follow the factors considered by the Board in the Hadley case:

(1) jeapordy to the public safety

(2) an evaluation of the testimony regarding a person's "functional" age, i.e. his ability and capacity to do the job rather than his chronological age; and

(3) whether it was practical to scrutinize the continued fitness of the employees on a frequent and regular basis.

Religion

Religion is not defined by the various human rights statutes and different terms are used to express the principle of no discrimination because of a person's religious convictions. Such terms are used as: religion, religious beliefs, religious creed, creed. The term "religion" was said in Faith v. Allan 1953 1 Ch. 810 to be used in its meaning of some particular system of faith and worship in distinction to the wider and truer meaning of religion as the recognition of some higher power in the world and the acceptance of the standards of spiritual and practical life that this recognition involves. This definition of "religion" is followed in Dunlop v. Calvary Temple (N.B. 1978) where the Board of Inquiry

stated: No discrimination because of or on account of religion refers more to the particular faith than to the practice of the faith.

Some regard for the employee's religious requirements is implicit in the employer's obligation not to discriminate in respect of any term or condition of employment 'because of his religion'. In the case of Froese v. Pine Creek School Division, 1978, a Manitoba Board of Adjudication concluded that an employer's obligation in this regard is to "reasonably accommodate the religious observance requirements of an employee where such accommodation can be made without undue hardship on the employer's business. To require an employer to bear more than a 'de minimis' cost can be an undue hardship. The degree or extent of the accommodation required and the measurement of the hardship to the employer must be determined on the facts of each case".

This obligation is reasonable to accommodate the religious observance requirements of employees provided the accommodation can be made:

(a) without undue detrimental effect on any overriding requirement of the public interest; and

(b) without undue hardship on the employer's business.

To require the public to suffer more than a'de minimis' detriment or to require an employer to bear more than a 'de minimis'cost can be undue. One can see the same principle manifested in the Newfoundland case of Anthony v. Dominion Distributors, 1977.

On May 31, 1977 a decision was rendered by Peter A. Cumming, appointed a Board of Inquiry by the Minister of Labour in Ontario in the Matter of the Complaint of Ishar Singh alleging discrimination in employment because of his creed. In that case the issue involved alleged discrimination in refusing to employ as a security guard a Sikh because of his requirement to wear a turban and remain unshaven, contrary to the dress code for security guards.

Mr. Cumming adopted the test of Section 701 (j) of The Civil Rights Act of the United States in determining an employer's obligation under Section 4(1)(a) of The Ontario Human Rights Code which prohibited a refusal to employ because of creed.

At page 35 he states:

"Security is bound to accommodate its employees' and prospective employees' religious practices unless Security can demonstrate that it is unable to reasonably accommodate an employee's or prospective employee's religious practice without undue hardship on the conduct of its business. Security has not met, and in my opinion is not able to meet,

this onus in the factual situation before this Inquiry.

In my opinion, Security has contravened section 4(1)(a) of The Ontario Human Rights Code".

Handicap

The provincial legislation proscribing discrimination on the grounds of physical disability or handicap is sparse in Canada. As of January 1980 the provinces of Manitoba, Quebec, New Brunswick, Nova Scotia and Prince Edward Island list physical handicap, or physical disability (N.B.) as one of the proscribed grounds of discrimination in the employment section of the human rights codes. British Columbia has dealt with cases involving discrimination against the physically handicapped under the "unreasonable cause" section of the British Columbia Human Rights Code.

Under the public accommodations section of the Human Rights Act of N.S. and P.E.I., the ground of physical handicap does not apply.

Physical handicap persuant to the Nova Scotia, Manitoba, and P.E.I. Human Rights Acts means "a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness includes epilepsy, but is not limited to, any degree or paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment,

or physical reliance on a guide dog, wheelchair or other remedial appliance or device". While substantially the same, the N.B. Act prohibits discrimination on the grounds of "physical disability" which means: "any degree of infirmity, malformation or disfigurement of the body suffered by a person as a result of injury, illness or birth defect, and includes any handicap resulting from epilepsy, paralysis, lack of co-ordination, amputation, blindness, deafness, muteness or reliance upon a seeing-eye dog, a wheelchair, a cane or crutch or any other remedial appliance or device."

Insofar as "physical disability" is one of the "newer" proscribed grounds, the jurisprudence is scarce. One Board of Inquiry held under the British Columbia Act was the case of Jefferson v. British Columbia Ferries Service 1976. This Board found that physically handicapped persons constitute a protected category under Section 8(1) of the B.C. Human Rights Code. The Board did however also find that 'bona fide' qualifications can be used to refuse to employ a physically handicapped person, such as is provided for by statute in those jurisdictions which include physical handicap or physical disability under the human rights legislation.

Marital Status

Each provincial jurisdiction in Canada prohibits discrimination on the basis of marital status in the employment section of the human rights legislation. There

is no definition provided in the legislation for marital status, or civil status (Quebec). At the administrative level of the human rights commission, the term "marital status" is taken to mean discrimination because one is single, married, divorced, separated, widowed.

Segrave v. Zellers 1975, a Board of Inquiry in Ontario found Zellers to be guilty of discrimination in employment practices because of marital status. In this case, the respondent was discovered to be using a pre-employment interview form which assessed the job applicant as to her marital status : Married, scored with 5 points, single, score 3 (single included those separated, divorced or widowed more than two years), if widowed in the past two years, score 1, and if separated or divorced in the past two years, score O, and candidate eliminated.

Sex, Sexual Orientation, Sexual Harassment

Sex

Provincial human rights legislation proscribes discrimination on the grounds of sex. This proscription applies to employment across Canada and to varying degrees to accommodations from province to province. None of the statutes provides a definition of sex, therefore we must look to the jurisprudence of the courts and boards of inquiry to learn what is meant by sex discrimination in Canada.

Sex Not Inclusive of Sexual Orientation

In the case of Wilson v. University of Saskatchewan 1975, the court found that the provision prohibiting employment discrimination against any person on the basis of sex, as provided for in the Saskatchewan Fair Employment Practices Act, would generally be considered to refer to discrimination on the basis of whether or not that person was a man or a woman. The prohibition does not refer to sexual orientation, sexual proclivity, or sexual activity. In other words, "sex" would generally and popularly be regarded as referring to the gender of the employee or prospective employee and not to the sexual activities or propensities of that person.

In the case of Dunlop v. Calvary Temple Inc., 1978, a Board of Inquiry in New Brunswick also found that the word "sex" must be used in relation to the biological differences between male and female, "notwithstanding the more popular meaning which has developed in relation to certain activities between male and female or even in relation to activities between persons of the same biological type. In other words, 'because of sex' probably does not mean 'because of sexual activities'."

Sexual orientation is a specific proscribed ground for discrimination only in the Quebec Charter of Human Rights and Freedoms. In British Columbia, Section 3 of the Human Rights Code forbids discrimination in accommodation, service and

and facility unless reasonable cause exists for such discrimination. The sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premium or benefits under contracts or insurance.

A well publicized and very important case under the B.C. Code is The Gay Alliance v. Vancouver Sun (1975) 5 W.W.R. 198 (1979) 27 N.R. 117 (S.C.C.) (B.C.C.A.). In this case the respondent newspaper refused to publish an advertisement submitted by a homosexual organization. The latter complained of refusal of a service and facility on unreasonable grounds, namely the sexual orientation of the group in question. The Board of Inquiry concluded that no reasonable cause existed for the Vancouver Sun to refuse to publish the advertisement submitted by the Gay Alliance. This decision was reviewed by the B.C. Supreme Court, the Court of Appeal and the Supreme Court of Canada. While the Gay Alliance did not ultimately win its case, the Supreme Court did not base its decision on the exclusion of sexual orientation from the meaning of reasonable cause in the B.C. Human Rights Code.

Sex is not the same as pregnancy under the human rights legislation according to a finding in Gibbs v. Surrey Board of School Trustees 1978, a Board of Inquiry established under the British Columbia Human Rights Act. The provision

"No person shall discriminate on the basis of sex" does not suggest pregnancy. The quoted sentence means to most people that they must not distinguish between male and female. It does not suggest that the prohibition applies to the distinction between females who are pregnant and females who are not pregnant.

In Attorney General of Canada v. Stella Bliss A-121-77 (June 2, 1977) Pratte, J. states emphatically that special rules about pregnancy do not constitute discrimination on the basis of sex. This case held that the provisions of the Unemployment Insurance Act relating to benefits for pregnant former employees do not violate the sex discrimination protections of Section 1(b) of the Canadian Bill of Rights.

Reference was made by Chairman Hebenton in the Gibbs case to the American jurisprudence with special reference to the decision of the United States Supreme Court in the case of General Electric Co. v. Gilbert, 429 U.S. 125, (1976). In General Electric, the U.S. Supreme Court followed its decision in Geduldig v. Aiello 417 U.S. 484 (1974) in which it had held that a disability program which excluded pregnancy disabilities did not constitute sex discrimination in violation of the fourteenth amendment.

The point that should be underscored here is that the American cases and the Bliss and Gibbs cases in Canada find that discrimination because of pregnancy is not sex discrimination

in cases where there is the denial of benefits. It is not as clear with reference to other matters. If one refers to Nashville Gas Company v. Satty 54 L.ED. 2d. 356 (1977) we find a case distinguished from the General Electric case on the ground that Satty involved the creation of a burden: pregnant employees lost their seniority whereas General Electric involved the denial of a benefit.

Sexual Harrassment

Sexual harrassment in the work setting is an area of sex discrimination that is commanding the attention of human rights agencies. In Ballesta (1979) an Ontario Board of Inquiry dealt with a case of a female employee who alleged sexual harrassment in employment and the Board proceeded with the case on the grounds that such harrassment was a form of sex discrimination proscribed under the human rights law.

Sex as a proscribed grounds of discrimination covers sexual harrassment where because of the worker's sex some term or condition of employment is modified by the sexual harrassment of another. The focus is both on gender as well as the social meaning of sex. Thus sexual harrassment of a worker, most often the female worker, is discrimination because of sex. MacKinnon [1] writes that:

> "Practices which express and reinforce the social inequality of women to men are clear cases of sex-based discrimination in the inequality approach.

1. MacKinnon, Catherine A., "Sexual Harrassment of Working Women" Yale University Press, New Haven, 1979 at p. 174

Sexual harassment of working women is argued to be employment discrimination based on gender where gender is defined as the social meaning of sexual biology. Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context. Three kinds of arguments support and illustrate this position: first, the exchange of sex for survival has historically assured women's economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women".

CHAPTER V

PRE-EMPLOYMENT DISCRIMINATION ACTS

Prohibited Discriminatory Employment Advertisements

There are two areas of employment advertisement which are of special importance for affirmative action officers: the first relates to general advertisement for employment and the second relates to the application form utilized.

Each of the provinces prohibit discriminatory employment advertisements. Basically no person is permitted to publish, display, circulate or broadcast or cause or permit the publication of any words or symbols or other representations that indicate directly or indirectly that race, creed, colour, age, sex, marital status, nationality, place of origin, etc., is or may be a limitation, specification or preference for a position or employment.

There may be some civil libertarian question of regulating the press involved in the situation where a newspaper places an advertisement found unacceptable by the Human Rights Commission. Provincial jurisdiction is limited in matters of regulating the press. (Tardiff v. Daily Gleaner 1973), as was considered by a Board of Inquiry in New Brunswick. In

the case of an advertisement being directed to employment provincial jurisdiction is much clearer, insofar as labour is under provincial jurisdiction.

The Board of Inquiry in the Alberta Case of The Human Rights Commission v. The White Court Star, 1976 recommended the following procedure for newspapers to adopt concerning the publication of advertisements which state a preference as to sex or age:

(i) THAT upon receipt of a request from an employer to publish an advertisement for employment which expresses a preference based upon age or sex the publisher advise the customer of the relevant provision of The Individual's Rights Protection Act and thereafter require that the customer submit information which satisfies the publisher that the basis exists for a claim of Bona Fide Occupational Qualification.

(ii) THAT the advertisement in question then be published, but containing a statement to the following effect:

"The sponsor of this advertisement claims a preference for (a male/a female/age) based on a bona fide occupational qualification."

The Ontario Code permits an exception to the above provisions where a limitation, specification or preference

as to sex or marital status is based on a bona fide occupational qualification and requirement for the position.

Specific grounds and Application Forms

As of January 1, 1980 human rights legislation in Canada contain provisions which proscribe discrimination through the use of application forms, pre-employment inquiries, advertisements etc. The various prohibited grounds of discrimination are:

PROVINCE	PROSCRIBED GROUNDS
Alberta	race, religious beliefs, colour, sex, age (45-65), ancestry, place of origin (sex, age may be asked for on an application form)
British Columbia	race, religion, colour, sex, marital status, age (45-65), ancestry, place of origin (sex, marital status and age may be asked for on an application form, but race, religion, colour, ancestry, place of origin, political belief must not be asked for)
Manitoba	race, nationality, religion, ethnic or national origin, political beliefs, family status, physical handicap, marital status, colour, sex, age (age of majority & over)
New Brunswick	race, colour, religion, national origin, ancestry, place of origin, age (19 and over), marital status, sex, physical disability
Newfoundland	race, religion, religious creed, political opinion, color ethnic, national or social origin, age (19-65), assignment, attachment, seizure of pay, sex, marital status.
Nova Scotia	race, religion, creed, colour, ethnic or national origin, age (40-65) sex, marital status and physical handicap

Ontario	race, creed, colour, nationality, ancestry, place of origin
P.E.I.	race, religion, creed, colour, sex, marital status, ethnic or national origin, political belief, age (18-65), physical handicap
Quebec	race, colour, sex, civil status, religion, political conviction, language, ethnic or national origin, social condition, sexual orientation, handicap
Saskatchewan	race, religion, religious creed, colour, sex, nationality, ancestry, place of origin, marital status, physical disability, age(18-65)

Pre-Employment Inquiries

The job interview situation is one where sometimes information is orally solicited from the candidate which is subsequently used to discriminate against that person.

For example, questions are asked orally about the interviewee's marital status which can then be assessed negatively to discriminate against the individual. The Ontario case of Segrave v. Zellers, 1975 illustrates this situation:

This case involved discrimination because of sex, and the question of marital status. In conducting the interview of the complainant for the credit management trainee position, Miss Sendall, a personnel manager, was utilizing exhibit 13; a form provided to her by the head office of the respondent in Montreal for the purpose of evaluating

applicants. Question 4 of the Scoring Instructions on the reverse side of this document reads as follows:

If separated or divorced in past two years, circle U.

If widowed in past two years, circle ?.

Any other answer circle D.

D?U

At the bottom of the sheet there are instructions which indicate that if an applicant has obtained one or more U's or two or more question marks at the completion of the questioning he will normally be rejected for any position. In addition to this form, the interviewer is also provided with a booklet styled "Interview and Selection Wrap-Up form 193", Exhibit 10 in the proceedings, which includes a form similar to Exhibit 13 and contains the following provision:

Are you:

Single Married ☐ Separated ☐ Divorced ☐ Widowed ☐

Date Date Date Date

(U) If separated or divorced in past two years.

(?) Widowed in past two years (D) Other

WITH instructions to circle the appropriate symbol.

In another form contained in Exhibit 10 which is headed "Confidential Weighted Scoring Sheet For Use With Employment Application, Not To Be Discussed With Applicant", the following scoring instruction is given:

"If separated or divorced in past two years, this is a knockout, score 0. If widowed in past two years, score 1. If married, score 5. In single, score 3 (Single includes those separated, divorced, or widowed more than two years) ..... KO"

In terms of interpreting the cumulative scoring, the interviewer is instructed as follows:

"ONE KNOCK OUT:	process applicant further only if total weights indicate good risk (100 or better)
TWO OR MORE KNOCK OUTS:	applicant should not be processed further."

Miss Sendall was familiar with Exhibit 10 and the forms contained therein and knew that the Preliminary Interview Sheet that she was using, Exhibit 13, was merely a short form for the longer questionnaire contained in Exhibit 10. The long form referred to K.O.'s rather than U's but the symbols designated the same effect and the forms were substantially the same.

Of course the complainant scored a 'U' on question 4 of exhibit 13 because of his recent divorce. The Board held that in this case the discrimination with respect to marital status was not only a proximate cause of the complainant being denied recruitment but was a major or primary cause for his failure to become employed. In any event, even if this Board of Inquiry were precluded from inquiring into the validity

of the reasons with respect to the other grounds for refusing recruitment, there is no doubt that the improper discrimination was a ground or a proximate cause for Miss Sendall's decision. The Board follows the reasoning of Hughes, J. in Regina v. Bushnell Communications Ltd. et al. (1974) 1 O.R. (2d) 442, affirmed (1974) 4 O.R. (2d) 288 wherein he considered the interpretation of Section 110(3) of the Canada Labour Code R.S.C. 1970 C.L.-1 making it an offence for an employer to "refuse ... to continue to employ any person ... because the person is a member of a trade union". He held that it was sufficient, if the evidence satisfied the court, that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason, or one incidental to it, or as one of many reasons regardless of priority. He said at p. 447:

> "In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application."

I think the same reasoning is applicable to the wording of Section 4(1)(a) and accordingly this Board finds that there has been a contravention of that subsection.

Pre-Employment Testing

Canadian experience is not very extensive with regard to attacking the discrimination inherent in some forms of employment testing whether psychological, aptitude or other tests. The American experience is much more extensive and is mentioned briefly by way of reference.

Guidelines

Most provincial human rights commissions issue a guide for employers indicating what constitutes legal and illegal questions relative to pre-employment questions with special reference to employment application forms.

Jan. 1, 1980

ILLUSTRATION #2

Grounds of Discrimination in matter of Application Forms

JURISDICTION PROVINCE	RACE	RELIGION	COLOUR	SEX	MARITAL STATUS	AGE	ANCESTRY	PLACE OF ORIGIN	NATION-ALITY	ETHNIC OR NATIONAL ORIGIN
BRITISH COLUMBIA *	X	X	X	X*	X*	45-65	X	X		
ALBERTA *	X	Religious Belief	X	X*		* 45-65	X	X		
SASKATCHEWAN	X	Religion & Creed	X	X	X	18-65	X	X	X	
MANITOBA	X	X	X	X	X	Age of majority & over			X	X
ONTARIO	X	Creed	X				X	X	X	
QUEBEC	X	X	X	X	Civil Status					X
NEW BRUNSWICK	X	X	X	X	X	19 & Over	X	X		National Orig
NOVA SCOTIA	X	Creed & Religion	X	X	X	40-65				X
PRINCE EDWARD ISLAND	X	Religion & Creed	X	X	X	18-65				X
NEWFOUNDLAND	X	Religious Creed & Religion	X	X	X	19-65				Ethnic, Natio al or Social Origin

British Columbia and Alberta Sex, Marital Status and Age may be asked for

Jan. 1, 1980

ILLUSTRATION #2

Grounds of Discrimination in matter of Application Forms

JURISDICTION PROVINCE	POLITICAL BELIEF	FAMILY STATUS	PHYSICAL HANDICAP	LANGUAGE	SOCIAL CONDITION	SEXUAL ORIENTATION	ASSIGNMENT ATTACHMENT SEIZURE OF PAY
BRITISH COLUMBIA *	X*						
ALBERTA*							
SASKATCHEWAN			Physical Disability				
MANITOBA	X	X	X				
ONTARIO							
QUEBEC	Political Convictions		X	X	X	X	
NEW BRUNSWICK			Physical isability				
NOVA SCOTIA			X				
PRINCE EDWARD ISLAND	X		X				
NEWFOUNDLAND	Political Opinion						X

*

British Columbia: political beliefs may not be asked for on an application form, but there is no provision specifically prohibiting application forms which directly or indirectly express a limitation, specification or preference as to political beliefs

Employment Agencies

Who is an employment agency? - An employment agency includes a person who undertakes with or without compensation to procure employees for employers, and a person who undertakes with or without compensation to procure employment for persons.

Employment Agencies from Accepting Discriminatory Orders

The human rights legislation in various jurisdictions proscribes discrimination on the given grounds by employment agencies. The employment agencies may not distribute discriminatory application forms nor act upon requests which are discriminatory. In sum, none of the activities with respect to job placement which are undertaken by employment agencies may be based on any of the proscribed grounds of discrimination.

Agencies Prohibited from Accepting Discriminatory Orders

Provincial human rights legislation prohibits any employment agency from accepting discriminatory orders for employees submitted by employers. Some provincial statutes are very explicit concerning this matter.[1]

Client-Agency Confidentiality

Client-agency confidentiality is often a problem encountered by the human rights officer who is involved in an investigation of an employer and employment agency.

1. cf. Nova Scotia Human Rights Act, Sec. 8(2)
Prince Edward Island Human Rights Act, Sec. 6(2)

However, the wide powers given to the human rights commission to investigate can be used to overcome this barrier.

CHAPTER VI

EMPLOYEE ORGANIZATIONS

Employment and Membership in Professional Associations

Provincial human rights legislation provides that professional associations, trade associations, business associations, occupational associations, professional corporations or associations of persons carrying on the same profession shall not discriminate.

"Professional associations" means an organization of persons that by an enactment, agreement or custom has power to admit, suspend, expel, or direct persons in the practice of any occupation or calling.

"Occupational association" means any organization, other than a trade-union or employer's organization, in which membership is a prerequisite to carrying on any trade, occupation, or profession.

"Business or trade association" means any organization of persons that by an enactment, agreement or custom has power to admit, suspend, expel or direct person in relation to any business or trade.

Two representative cases which have dealt with the question of this kind are Dickenson v. Law Society of Alberta (1978) 10 A.R. 120 and Human Rights Commission v. College of Physicians and Surgeons (1976) B.C. Board of Inquiry

Trade Union Membership

Discrimination by a trade union on any of the prohibited grounds is illegal in all provinces. No employees' organization may exclude any individual from full membership or expel or suspend or otherwise discriminate against any of its members because of that individual's race, religion, creed, colour, sex, physical handicap, etc.

Jurisprudence on the responsibility of trade unions to act fairly and without discrimination is being developed as illustrated in Edwards v. Society of Graphical and Allied Trades (1970) 3 All E.R. 689, 696

Parties to Discriminatory Clauses in a Collective Agreement

Collective bargaining parties do not have the right to negotiate, nor enter into an agreement with any person which would have the effect of eliminating a person's individual egalitarian right to be free from discrimination. In Re Attorney-General for Alberta and Gares (1976) 67 D.L.R. (3d) 635, the court held that the provisions of a collective agreement which was the source of discrimination was no defense against an act of discrimination.

CHAPTER VII

EMPLOYER ACTIVITIES AND HUMAN RIGHTS

Who is an Employer

As mentioned above, human rights legislation applies to the employer, employer organizations, or any person acting on behalf of the employer.

Thus, in the case of Dunlop v. Calvary Temple Inc. 1978, the Board distinguished between a person acting on behalf of the employer, or acting with the consent of the employer, from a person acting contrary to the instructions of the employer.

The situation of persons who aid or abet the employer in a violation of the Human Rights Code is referred to in the Alberta case of Hayes v. Central Hydraulic Manufacturing Co. Ltd. 1973. Herein, the Board noted that pursuant to Section 4 of the Summary Convictions Act:

> "4. A person is a party to and guilty of an offence who
>
> (a) actually commits the offence, or
>
> (b) does or omits an act for the purpose of aiding a person to commit an offence, or
>
> (c) abets a person in the commission of the offence, or
>
> (d) counsels or procures a person to commit an offence."

Terms and Conditions of Employment

Human rights legislation across Canada prohibits discrimination on the stated grounds with respect to terms and conditions of employment. The focus of the proscription of discrimination is on any term or condition of employment. The legislation has been given broad and general interpretation in order to cover all those matters which relate to the employment setting, whether wages, employee benefit packages, housing, transportation, health care, safety and similar matters.

A case involving workers' housing as a condition of employment was considered in: Tharp v. Lornex Mining Corp. Ltd., 1975. In this case, a complaint filed by Jean Tharp in British Columbia, because she had been provided inappropriate housing by the Lornex Corp. at the site of a mining operation. One of the conditions of employment was the provision of living accommodation at the mining site. Thorp charged that: "facilities that were to be provided...are not suitable for females, also camp staff have been intimidating me. Staff gets free board and room, I am staff, but do not get free board and room."

Counsel for the respondent argued before the Board, that because the matter of campsite facilities was not included in the collective agreement, then Lornex was under no obligation whatsoever to provide campsite accommodations. The matter of room and board could not be a condition of employment.

The Board of Inquiry concluded that even if the matter of room and board and rates for room and board may not be a condition of employment strictly, the alleged discriminatory conduct of Lornex is nevertheless within the ambit of Section 8 of the British Columbia Human Rights Code, which forbids discrimination in respect of employment. The Board held that the language of Section 8 is not confined to the terms set forth in a contract of employment, but rather contemplates a much broader scope. The language of Section 8(1) begins by speaking of a right of equality in respect of "occupation or employment" and goes on "without limiting the generality of the foregoing" in subsection (a) to prohibit discrimination "in respect of employment or a condition of employment." It cannot be said that Section 8 addresses itself only to the conditions and terms of employment contained in a contract of employment. Denial of a casual benefit to female employees which is available to male employees is no less discriminatory than the payment of lower wages to female employees for precisely the same work as performed by male employees. The Board acknowledges that there was no obligation on the part of Lornex to provide accommodation for its employees, but if accommodation is provided it must be provided on a non-discriminatory basis.

Hours of Work as a Condition of Employment

Management reserves the right to determine the hours of work either as master or through the negotiations with the employee organization with the hours of work being contractually established.

In Anthony v. Dominion Distributors Ltd., 1977, a Commission of Inquiry established under the provision of Section 16A of The Newfoundland Human Rights Code, heard the case of Mr. Anthony a member of the World Wide Church of God. The complainant observed the Sabbath from sundown on Friday to sundown on Saturday, and did not wish to perform any work on Fridays and the union did not disapprove if the company was in agreement.

The company found the issue inconvenient as there was usually a last minute rush on Friday evenings and it was beneficial for all employees to be available at this time.

The Commission of Inquiry found that Mr. Anthony was not terminated from his job because of his religious practices, rather the complainant left his job voluntarily because to work during hours which he regarded as part of the Sabbath was contrary to his religious convictions. The Commission recognized the right of the company to require the adherence by employees to the Company workday of 8:00 a.m. to 5:00 p.m.

Advancement and Promotion

Advancement and promotion as well as other forms of career development are considered to be within the meaning of "terms and conditions" of employment. Consequently, no form of discrimination whether on the basis of sex, marital status, or age, etc. can occur with reference to advancement and promotion in employment. The 'bona fide' qualifications can apply here, but again, the burden of proof that such a qualification exists will rest on the one who claims it.

Employee Benefit Programmes

Terms or conditions of employment may encompass a wide array of employee benefit programmes, such as: pension plans, group life insurance plans, long term disability and other income protection plans, accidental death and dismemberment plans, and health insurance plans. Since benefit programs may be made available to employees by an employer on either a voluntary or compulsory basis, and under various contribution agreements, some clarification is required with respect to the range of benefit programs which fall within the scope of the phrase "term or condition of employment".

Human rights legislation applies to both voluntary and compulsory plans in respect of which the employer pays any part of the cost, on the basis that all such plans can be defined as either "terms of employment" or "conditions of employment". On this basis, the only categories of benefit

programs which do not fall within the scope of the Human Rights Acts are the following:

1. Voluntary benefit programs offered to the employees of a given employer or employers, in which the employee contributes the full cost of the benefits.
2. Voluntary plans which are not connected specifically with employment for any given employer, such as plans which are established to cover members of professional or other associations and in which the plan members pay the entire cost of the benefits.

Guidelines

Several provincial human rights commissions have published Guidelines concerning the application of the legislation to employee benefit programs as a term or condition of employment.

Equal Pay Provisions

Several jurisdictions have special provisions in the Labour codes or human rights codes dealing with equal pay for work of equal value, equivalent work, same work, or substantially the same work.

Professor Mary Eberts [1] has written on some of the developments in Canada with respect to equal pay legislation

1. Eberts, Mary, "Enforcing Equal Pay and Equal Opportunity Legislation: Mission Impossible" In: Issues and Options Equal Pay/Equal Opportunity, Ontario Ministry of Labour, Toronto, 1978 pp. 59-76

and points out that there is a gradual broadening of the standards governing equal pay, yet the need to establish similarity in each of the three categories of skill, effort and responsibility is still with us.

It would appear that the real breakthrough will only come when the legislation and its enforcement approaches the problem systemically.

CHAPTER VII

EXEMPTIONS AND EXCEPTIONS

All provincial jurisdictions provide for many exemptions and exceptions as to the application of the human rights act. Exceptions, limitations and exemptions under given conditions apply to publications, signs, displays, public accommodation, services, facilities, occupancy, property, and sales as well as certain groups, such as non-profit organizations.

For the purpose of the present work, we shall consider only the exemptions and exceptions as they relate to employment.

Employer Related Exemptions and Exceptions

Human rights legislation is flexible in the sense that it provides for the recognition of exceptional circumstances of employers which may require exemption from the general provisions. Thus one finds exceptions made for religious and philantropic organizations whereby such employers are not considered employers under the legislation[1]. Also exceptions are made to the situation where an employer terminates employment of a worker because of the terms of a 'bona fide' insurance plan[2].

1. cf. Saskatchewan Human Rights Code Sec. 2(f)
2. cf. New Brunswick Human Rights Code Sec. 3(6)

Exceptions Related to Pre-Employment Inquiries

Many jurisdictions allow for exceptions to the prohibited practices on various grounds. Usually the exceptions can be related to the existence of a 'bona fide' occupational qualification (B.F.O.Q.). When an exemption exists, the advertisement of the exempted provision will generally indicate this fact as illustrated below.

- POSITION OPEN -

Position:

EDUCATION WORKER (Indian)

CONDITIONS OF EMPLOYMENT:

Employed by School District 26 as a term Indian Education Worker at a salary based on qualifications.

QUALIFICATIONS:

Preferably Grade X minimum but personal suitability more important. Ability to work with children and adults. Applicants must be Indian and have knowledge of Maliseet language and culture. (Bona Fide exemption granted by N.B. Human Rights Commission.)

Application forms available from:

Mr. C.J. McFarland
School District 26
P. O. Box 10
Fredericton, N.B. E3B 4Y4

Closing Date: FEBRUARY 2, 1979

Exceptions Related to Trade Unions

Exceptions to the prohibitions against discrimination by trade unions exist in several jurisdictions. Such exceptions might relate to instances in which a criminal or summary conviction modifies the right to membership in a trade union. Often the exception is tied to the operation of a 'bona fide' pension or insurance plan. One also finds professional associations being exempted by statute to limit membership to British subjects.

'Bona Fide' Occupational Qualification (BFOQ)

What constitutes a 'bona fide occupational qualification (BFOQ), and who is to decide on the matter is an important part of human rights enforcement. In answer to the latter question, it is only in the New Brunswick legislation that it is specified that the Human Rights Commission determines the existence of a BFOQ. This provision was upheld by the Board of Inquiry in Charles Little v. Saint John Shipbuilding and Dry Dock Ltd. (N.B., 1980). However the Board ruled that it had the jurisdiction to make a recommendation to the Commission on a matter of BFOQ that might come before the Board. In cases that come before Boards of Inquiry the existence of a BFOQ is clearly a matter that the Board can address in Canada. Excluding New Brunswick, it is the employer in Canada who shall determine the existence of a BFOQ. This determination will apply as long as it generally was made in

good faith and was based on some reasonable foundation of fact which would justify the employer making such a decision.

Burden of Proof

The burden of proof in seeking to declare the existence of a BFOQ rests with the party making such a claim. This conclusion follows from both American experience and Canadian Boards of Inquiry.

In Weeks v. Southern Bell Telephone and Telegraph (1969) 408 F 2d. 228, the court ruled that the burden of proof for the existence of a BFOQ lies with the person who asserts an exception to the general provisions of the law. The reasoning in Weeks has been followed by Canadian Boards of Inquiry (cf. Shack v. London Driv-Ur-Self Ltd., 1974, Ontario, Hadley v. Mississauga, 1976, Ontario, Derksen v. Flyer Industries, 1977, Manitoba, Hall v. Etabicabe, 1977, Ontario, Little v. Saint John Shipbuilding, 1980, N.B.) These Boards have held that the respondent has the carriage of the burden of proof that a BFOQ exists.

The Canadian decisions relating to BFOQ can be briefly reviewed as follows:

Sex

The most important Canadian case that deals with BFOQ and sex was the Shack case. The words of the Board best

describe its considerations as the Inquiry followed the reasoning of the American Court in Weeks:

> "There (Weeks) it was held that a woman, who applied for the position of switchman with the defendant company (Southern Bell), was wrongly discriminated against. Nor did the Court accept as an excuse that the job required, as a routine and regular habit, the lifting of equipment weighing in excess of 30 pounds. Evidence was led in that case demonstrating that the plaintiff was in fact capable of performing this physical feat. The Court held, moreover, that it was not sufficient to bring an employer within the saving statutory provision merely by the labelling of a job as "strenuous". More than that had to be shown. The employer had to establish 'that he had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved'"

and the defendent company adduced no evidence concerning the weight-lifting abilities of women. Accordingly, the court held that the defendant's preference of men over women for

the switchman position was not justified. And in Diaz v. Pan Am World Airways Inc. (1971) 442 F. 2d. 385, the same Court, although differently constituted, added that discrimination in hiring based on sex is valid only when there is a threat that the essence of the business operation would be undermined by not engaging members of one sex exclusively.

Applying these principles to the present inquiry, it becomes clear that the physical requirement of the rental clerk position does not excuse the denial of employment to women. The respondents have not demonstrated, and in fact have conceded in their testimony, that women are as capable as men in physically converting a stake truck.

Age

The determination of BFOQ with reference to age is becoming a very prominent issue for human rights workers in Canada. The general direction for approaching this difficult problem was given by an important American decision: Hodgson v. Greyhound Bus Lines Inc. (1974) 449 F 2d. 859, cert. denied, 95 S. Ct. 805 United States Court of Appeal, 7th Circuit. In this case the Court was addressing the question of whether a bus company could use age as a BFOQ, and suggests in its decision that in situations where public safety is involved, the burden of showing the existence of a reasonable occupational qualification should be less

onerous than might otherwise be the case. The Court spoke about there being demonstrated a "natural basis in fact" for believing "that elimination of its maximum hiring age would increase the likelihood of risk of harm to its passengers..."

The important Canadian Boards of Inquiry in this matter are Derksen, Hadey, Hall and Little. In Derksen the Board held that a BFOQ could exist where it can be shown that the public or other person might be adversely affected or harmed because the very age of the employee might make it obvious he could not as safely perform his duties as would someone younger in age. This might be the case in certain types of hazardous employment where the safety of the employee himself was in question or in employment where the lives of the public were at stake and some special skill was required, for example, airline pilots or operators of motor vehicles. Once again, however, substantial evidence would have to be adduced by the employer to demonstrate the incapacity or reduced capacity occasioned by the age of the employee.

In Hadley, the Board was considering the applicability of age to a BFOQ for firefighters and held that the respondent did not offer much evidence to substantiate the existence or the need for such a qualification. With reference to the Greyhound case, where an element of risk to the public was involved, whereas this was not demonstrated in the Hadley case.

In Hall, the Ontario Supreme Court, O'Leary, J. held that the determination of the existence of a BFOQ must be based on the "practical reality of the work-a-day world" and that detailed scientific data will not always be necessary and, of course, will not always be available.

In Hawkes v. Brown's Ornamental Iron Works of Belleview Ltd. (1977) Ontario, the Board held that in order to satisfy the proof for a BFOQ the employer must demonstrate that there are "sound reasons for the qualification".

In the Little case the Board continued the line of reasoning of the above cited cases. This Board did state that 'if it can be shown that the likelihood of an individual over a certain chronological age does not meet a given acceptable performance level then in such circumstances a BFOQ could be said to exist. With reference to statistical data, the Board added, that where such data is able to show that there is a reasonable probability of individuals beyond a certain age having difficulty meeting the minimally acceptable performance standards for a particular job, it can be logically argued that a BFOQ ought to exist.'

CHAPTER XI

ENFORCEMENT AGENCIES

STATUTORY HUMAN RIGHTS AGENCIES

Human Rights Commissions

There is a human rights commission in each Canadian jurisdiction. These commissions are appointed and have the principal responsibility for the enforcement of the human rights legislation across the country. In some jurisdictions the head of the commission is appointed for a fixed term and cannot be removed from office without the approval of the legislative body. The members of the commission are full-time or part-time; one is the chairperson of the Commission.

The accountability of the Human Rights Commission is through the Attorney-General, Labour Minister or a Minister especially designated by the Executive Council.

Several jurisdictions have numbered lawyers among their permanent staff members. Thus, legal work is conducted by commission staff. However, other agencies use private legal firms or government lawyers.

Agents of the Commission

All the human rights acts provide for the settlement of complaints, if possible, by conciliation and persuasion. They provide for an individual to be charged with this responsibility. Depending on jurisdiction, the person charged with the task of conciliation may be an officer of a government department or the Human Rights Commission or any other person.

In Gares, Guiltner et al. v. Royal Alexandra Hospital (1974) the Board of Inquiry in Alberta held that the Commission members do not need personally to handle the details of every complaint but can delegate this role. The practice in Canada is for the human rights officers to do the information gathering work and to attempt the necessary conciliation efforts. In this regard it may be possible for the given human rights agencies to delegate the investigation and conciliation responsibilities to any other person, such as a contract compliance or affirmative action officer of another agency.

ENFORCEMENT - COMPLAINT PROCEDURE

The Complaint Requirement

The enforcement of anti-discrimination sections of provincial human rights legislation is based on the complaint process procedure. All provinces provide for the filing of a complaint which is to be made in writing. It is argued

that such a procedure eliminates unverified, second-hand or frivolous complaints. The Ontario Human Rights Commission may initiate a complaint where it has reason for believing that any person has contravened the Act. The Manitoba Human Rights Commission may investigate on its own initiative, and the Alberta and Nova Scotia legislation authorizes the Commission to investigate a case where the Commission "has reasonable grounds for believing that a complaint exists".

The necessity of a complaint has been considered by Boards of Inquiry:

In the Alberta case of Gares, Guiltner, et al v. Royal Alexandra Hospital (1974), the Board of Inquiry held that the only conditions precedent to its jurisdiction were that there be, firstly, a complaint and, secondly, the complaint be unsettled.

Conciliation and Investigation Functions

There are several steps that are followed by a human rights agency in dealing with a complaint. First, the agency makes a determination as to whether or not the matter complained of falls under the given human rights code. Where it is determined that a human relations issue is at stake although it falls outside the purview of the law, the human rights agencies often will take steps to resolve the problem. This is an example of what is referred to as informal cases or the using of "good offices".

After it has been determined that a case falls under the human rights act, then an investigation is conducted into the facts surrounding the given case. Tarnopolsky writes that "No effort should be made at this stage of investigation to conciliate or negotiate a settlement because either of these techniques implies at least partial implication that the alleged prohibited act has been committed". Professor Tarnopolsky continues: "After ascertaining the facts as far as he is able, the investigating officer should make a determination either that there is a probable cause for concluding that the offence occurred, or that the complaint is groundless. Only after a determination of probable cause should attempts be made to conciliate or to negotiate a settlement. Moreover, if at all possible, the negotiating or conciliating should be conducted by someone who did not investigate that particular complaint".[1]

The third step is that of conciliation. It has been the findings of several boards of inquiry that the human rights commission must make an attempt at settlement of the complaint through conciliation prior to adjudication by a tribunal. Only after conciliation has failed does the matter become a topic for address by a Board of Inquiry.

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1. Tarnopolsky, W.S., "The Iron Fist in the Velvet Glove" loc. cit. p. 576.

Terms of Settlement

The terms of settlement of complaints vary according to the situation. However, the general terms of settlement provide for vindication of the harm suffered by the complainant. With reference to employment discrimination this usually involves the respondent hiring the complainant. There is also required a review of the entire employment policies of the respondent and a requirement that there be a committment to comply with the human rights code in the future.

Recently one finds settlements including the undertaking by the employer to assess the given employment policy to ensure that women and minorities have greater employment opportunities. Often this will involve the broadening of the sources of recruitment and improving the promotion system within the organization.

Boards of Inquiry or Adjudication Tribunals

When conciliation fails and the matter complained of is not settled, human rights legislation in Canada provides for a formal inquiry to determine the matter.

The various jurisdictions provide for the establishment of the inquiry in different ways. The specific approach is determined by the given human rights laws. The findings of the inquiry serve as the basis for the conclusion of the case. In some jurisdictions it is the Inquiry Commission which itself issues direct orders to the parties. In

other jurisdictions the findings of the Inquiry are sent to the Human Rights Commission which then determine the action to be taken, whether by the issuance of orders or attempts at conciliation. In one jurisdiction[1] the findings of the Inquiry are sent to the Minister in the form of a recommendation and it is the Minister who may then issue an order.

Orders are ultimately enforceable through the courts.

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1. cf. Newfoundland Human Rights Act, Sec. 27(1).

CHAPTER X

AFFIRMATIVE ACTION AND PROVINCIAL LEGISLATION

Provincial Legislative Base for Affirmative Action Programmes

The Provinces of British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island and Nova Scotia provide the legislative faculty for affirmative action programmes. The model used is one whereby the Provincial Human Rights Commission *may* approve a programme undertaken by any person designed to promote the welfare of any class of persons.

There is no specific provision in the human rights legislation of Alberta, Quebec or Newfoundland which allows for an affirmative action programme. It would appear, therefore, that a citizen in these jurisdictions would be able to file a complaint alleging discrimination against an organization which established an affirmative action programme for a group of persons who were identified by one of the proscribed grounds of discrimination in the given human rights code.

Provinces with enabling Affirmative Action Legislation

Affirmative action programmes can be undertaken within the meaning of the facultative provisions of several human

rights acts across the country. The following is a description of this legislation in the provinces which have such provisions:

British Columbia

11.(5) The commission may approve programmes of government, private organizations or persons designed to promote the welfare of any class of individuals and any approved programme shall be deemed not to be in contravention of any of the provisions of this Act.

Saskatchewan

47.(1) On the application of any person or on its own initiative, the commission may approve or order any program to be undertaken by any person if the program is designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of members of that group, by improving opportunities respecting services, facilities, accommodation, employment or education in relation to that group.

(2) At any time before or after approval to a program is given by the commission, or a program is ordered by the

commission or a board of inquiry, the commission may:

(a) make inquiries concerning the program;

(b) vary the program;

(c) impose conditions on the program; or

(d) withdraw approval of the program as the commission thinks fit.

(3) Nothing done in accordance with a program approved pursuant to this section is a violation of the provisions of this Act.

Manitoba

Special employment programs (Section 9)

Notwithstanding the provisions of this Part, the Commission may, upon such conditions or limitations and subject to revocation or suspension, approve in writing a special plan or program by the Crown, any agency thereof, or any person designed to promote the socio-economic welfare and equality in status of a disadvantaged class of persons defined by race, nationality, religion, colour, sex, marital status, physical handicap, family status, age, source of income or ethnic or national origin of the members of that class of persons.

Ontario

Special employment programs (Section 6a)

Notwithstanding the provisions of this Part, the Commission may, upon such conditions or limitations and subject to revocation or suspension, approve in writing any special plan or program by the Crown, any agency therefor, any person to increase the employment of members of a group or class of persons because of the race, creed, colour, age, sex, marital status, nationality or place of origin of the members of the group or class of persons.

New Brunswick

13(1) On the application of any person, or on its own initiative, the Commission may approve a programme to be undertaken by any person designed to promote the welfare of any class of persons.

13(2) At any time before or after approving a programme, the Commission may

(a) make inquiries concerning the programme,

(b) vary the programme,

(c) impose conditions on the programme, or

(d) withdraw approval of the programme, as the Commission thinks fit.

13(3) Anything done in accordance with a programme approved pursuant to this section is not a violation of the

provisions of this act.

Nova Scotia

Approved Programs (Section 19)

The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

Prince Edward Island

19. The commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

The Need for Affirmative Action Programmes

The topic of Affirmative Action was treated by the Ontario Human Rights Commission in its' review study: "Life Together" (1) in which the following was stated:

"The Need for Affirmative Action Programs

At present, the Commission has the authority to approve special programs of affirmative action designed to assist groups in the province that have traditionally been denied employment opportunities on grounds that are prohibited by the Code. Special authority is required for affirmative action programs because they may institute, in effect, a form

(1) Report: "Life Together: A Report on Human Rights in Ontario", Ontario Human Rights Commission, Toronto, 1977 pp. 34-37

of "positive discrimination" in favour of the people to be helped that might otherwise contravene the Code itself.

However, while the Commission has the authority to approve affirmative action programs in the field of employment, it cannot, as the Code now stands, recommend that such programs be initiated in situations where in its judgement they are needed. Moreover, the Commission at present does not have the authority either to approve or to recommend affirmative action programs at all in the areas of housing and public services. The Commission believes that such authority is needed to counter situations of discrimination and inequity in opportunity which are the result of traditional practices or the legacy of years of unequal treatment. The Commissioners therefore recommend that the revised Ontario Human Rights Code include provisions to enable the Commission both to approve and to recommend special programs of affirmative action.

The Commission noted that in many situations there will be a role for the government to play in supporting appropriate affirmative action programs in the private sector, and it will be prepared to make recommendations to the government in such instances. For example, employers who are prepared to provide on-the-job training to employees to compensate for deficiencies in educational background, and developers who are prepared to make adjustments to their

buildings to make it possible for disabled or aged people to live in them, ought to receive appropriate support, by such means as cost-sharing arrangements, from the government agencies involved.

A good example of a useful affirmative action program is provided by the agreement entered into on 3 July 1976, between Syncrude Canada Ltd. and representatives of the Indian Association of Alberta and the Department of Indian Affairs and Northern Development. The program is designed to ensure the employment of qualified Indians over a ten year period in all parts of the oil-sands development. For its part, the government agreed to fund up to two years of pre-employment academic upgrading for those Indians who do not meet Syncrude's educational requirements. Syncrude agreed to arrange counselling services for Indian employees and their families to assist them with problems of adjustment to the living and working conditions involved. In addition, the company will provide orientation classes for its managerial and supervisory personnel to familiarize them with the cultural and social heritage of the Indian peoples.

Equality of opportunity is the goal. But, because of patterns of unequal access to educational, social, and job opportunities in the past, groups today such as women, Native people, racial minorities, and the physically disabled, find that other people have been given a head start. Unless

these groups are assisted by carefully designed affirmative action programs, which help to redress the balance of past discriminatory practices, they will often have great difficulty in improving their lot.

The reason that no non-white officers can be found on the police force of one of our largest cities, or that the average income of men in Canada is more than twice that of women, is not that women and blacks are innately less suitable for advancement than others. Such a conclusion amounts to blaming the victim for personal cirsumstances he or she did not cause."

The need for affirmative action programmes is caused therefore, by the effects of many years of racial disadvantages which minorities and women have suffered. When discrimination, both overt and systemic in the employment setting has been long and widely practiced against women and the visible minorities, it cannot be adequately eliminated by the prospective adoption of neutral, color blind standards for selection among the applicants for available jobs. Affirmative action is needed to overcome the barriers and disadvantages imposed by past discrimination. Affirmative action programmes provide remedy for systemic or collective discrimination even where there is no showing that the given individual beneficiaries of sex preference, or race preference have been adversely affected by systemic discrimination.

The current American jurisprudence can be found in Bakke v. Regents of the University of California (1978) 46 L.W. 4896 and Steelworkers v. Webber (1979) 47 L.W. 4851. Mr. Justice Brennan held in Weber that affirmative action programmes are congruent with the goal of anti-discrimination legislation. Given this legislative history, we cannot agree that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavour to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history" (Albermarle v. Moody 422 U.S. 405, 418 (1975)), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who have "been excluded from the American dream for so long" (110 Congressional Record at 6552 (remarks of Sen. Humphrey)) constituted the first legislative prohibition of all voluntary private race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Review of Prohibited Grounds of Discrimination of Special Interest for Affirmative Action

There are three groups of person who are obvious target groups for affirmative action special programmes in Canada. Native persons, women and the handicapped are groups who are victims of systemic discrimination consistently and in all areas of Canada.

Native Persons

The term "Native person" includes status Indians, the Metis and non-status Indians, and the Inuit.

The principle to recall is that racial barriers and discrimination occur where the respondent perceives an individual to be a Native person and acts on the basis of this perception, to the disadvantage of the Native person.

Women

The discrimination which victimizes women can be combatted by human rights legislation on the basis of several grounds: sex, marital status, sexual orientation (Quebec) "reasonable cause" (British Columbia) and age. Equal pay sections and maternity leave provisions of labour law and human rights legislation can also be applicable.

Handicapped

The physically disabled are protected from discrimination in employment by the provincial human rights codes of the following provinces: New Brunswick, Nova Scotia, Manitoba and Prince Edward Island. However reference can be made to industrial safety legislation and minimum employment standards legislation for further guidance relative to affirmative action. Indeed, where handicap is not a proscribed ground of discrimination an affirmative action programme would not require any approval from the Human Rights Commission.

Selected Principles of Affirmative Action Planning

Whether it is through the complaint resolution process or through the voluntary initiative of an employer, there are certain basic steps required to be taken in order to develop any affirmative action plan. These steps follow from some fundamental principles which are indicated below:

Legislative Basis

The preparation and implementation of an affirmative action plan will be best accomplished through close liaison with the various human rights commissions. In some jurisdictions it will be important to follow the guidelines for affirmative action plans which might be available from the human rights commission.

Articulation of Need for a Plan

Where a human rights commission is involved in a complaint resolution, there usually is 'prima facie' evidence of the absence of equal opportunity. The complaint process will involve an analysis of the employment policy of the respondent organization. This analysis will often afford an opportunity to consider the status within the organization of racial minorities and women.

In the situation where the company wishes on its own to establish a plan, it is still necessary to determine if a need for an affirmative action plan exists.

In either situation the suggested steps indicated by several published guidelines in determining need are: need of plan as determined by under-representation or utilization of minorities and women in the organization. This assessment may be made from the data gathered on the employment profile of the organization. The following data would be analysed:

(a) total employees divided per target group

(b) job classifications per target group participation

(c) salary level

(d) tenure and length of service per target group

(e) skill of all employees

(f) education level of all employees

(g) training availability and participation per target group

(h) separations

(i) employee benefit package

II Availability Study of target group (e.g. women, natives, other target groups) in the given community

AFFIRMATIVE ACTION AND SPECIFIC PRE-EMPLOYMENT ACTIVITIES

The Plan of Organization

Job analysis

Job description

Job classification

Job related qualification standards etc.

Many of the obstacles to fuller participation of women and minorities in the organization relates to an obstacle inherent to the job description or standard. For example the height requirement for police constables often excluded orientals. This is easily resolved by changing the height requirement.

The analysis of the present plan of organization of the company is the first step toward defining specific affirmative action goals. The spin off benefit is that systemic discrimination becomes more apparent.

Recruitment

As seen above, recruitment must not be conducted in such a manner as to contravene the human rights codes. However, even when there is no overt discrimination in recruitment,

discriminatory barriers might be covertly present.

(a)1.Advertising - The employer who is developing an affirmative action plan will need to adopt an affirmative action approach to advertising.

The human rights commission guidelines on advertising for employment should be consulted.

2. The 'old boy' network of seeking out new employees should be discarded.

3. Advertisement should be directed to the minorities and women. Use could be made of the ethnic press.

4. Written ads must not indicate discrimination according to the human rights legislation.

5. Where a 'bona fide' occupational limitation has been granted by the human rights commission in those jurisdictions which so provide, the advertisement for the privileged position should so indicate.

(b) Application forms

The application form for employment should be examined to comply with the guidelines of the Human Rights Commission. Over the past few years the human rights commission have been very active in getting employers to use more equitable application forms. This experience has led to the obvious conclusion that many common pre-employment inquiries disproportionally reject minorities and women and usually are not job related. Helpful questions to ask when reviewing

an application form might include: "Does this question tend to have a disproportionate effect in screening out minorities and women ?" "Is this information necessary to judge this individual's competence for performance of this particular job?" "Are there alternate, non-discriminatory ways to secure necessary information?"

(c) Interviews

Biased and subjective judgements in personnel interviews can be a source of discrimination. Interviewers should be trained to evaluate each candidate's individual ability and potential, and to know actual job requirements based on realistic job descriptions.

(d) Pre-employment Testing

Any test which indirectly discriminates against women or racial minorities or the handicapped because of irrelevant norms would be contrary to the human rights act. Therefore, any test which adversely affects the employment status of groups protected by the provincial human rights legislation must be professionally validated as an effective, significant predictor of effective job performance. Pending validation of tests, the affirmative action officer may encourage employers to eliminate those tests which screen out a disproportunate number of minorities and female applicants.

Employment Agencies

Officers of the Employment and Immigration Commission can ensure that the Canada Manpower Centres in the regions do not accept orders from employers who state a preference for persons on the basis of sex, marital status, age, race, etc. One may recall the provisions of human rights legislation which proscribes the employer from using an employment agency which discriminates, and prohibits an employment agency from accepting or filling discriminatory orders from employers.

The employment agencies that will be involved in the implementation of an affirmative action plan by a company should be included in the plan description. In order not to be liable for violations of the human rights act, the employment agencies participating in the recruitment of women, natives or other target groups, need to be part of the approved plan.

Employment agencies have a legal responsibility to avoid direct and indirect discrimination. These agencies can be assisted in meeting their responsibility in a variety of ways. One can begin by teaching the employment counsellors how to use non-sexist or non-stereotypical language. It would be also helpful to provide training in the art of interviewing which will make the interview situation more comfortable for the minorities and women. The benefit of good human relations will acrue to the employment agency, the client as well as to the candidates for employment.

Employers who are affirmative action oriented will be poorly served by an employment agency that operates in such a manner to exclude minorities and women from the labour market. It is important therefore that the employment agencies ensure that their interviewing procedures do not indirectly discriminate.

Professional Association of Employees

A successful affirmative action programme will need to secure the committment of the professional association to which employees belong. Human rights legislation proscribe discrimination by these associations and this legislative basis can be used to build upon.

Quotas which are imposed by the professions is a special problem area.

TRADE UNIONS AND AFFIRMATIVE ACTION

An affirmative action plan will be greatly enhanced where the trade unions involved are party to the development and implementation of the plan. Insofar as human rights legislation applies to the trade union, and considering the 'official' statements of support for the concept of affirmative action made by national labour organizations, affirmative action workers should find the trade unions natural allies.

The following steps could be followed in the development of the affirmative action plan with the trade union:

(a) Prepare a joint statement of committment by the union and company as to the purpose and intent of the plan.

(b) Establish a joint committee responsible for conducting the preliminary research, analysis and development.

(c) Inform the management staff as well as the union membership of the nature and object of the plan.

(d) Analyze the union constitution and bylaws for any barriers as to sex, age, marital status, race, etc.

(e) Analyze the collective agreement.

(f) Analyze the employee benefit plans

(g) Analyze surrounding labour market.

(h) Analyze the manpower need and the effect of the "union security clause" on the recruitment of new union members.

(i) Prepare a report with recommendations.

Upon establishment of the affirmative action plan at the initial phase, the union has a great deal of work to do in analyzing job classifications, promotion systems, training and other terms and conditions of employment. A special area of concern is the role of seniority. Seniority systems which perpetuate a discriminatory effect and formally exclude or segregate classes of persons must be challenged at the outset.

The overall affirmative action plan will include for the union target dates and objectives to be achieved.

Where the provincial human rights commission must approve the affirmative action plan, it will be important to specify

the union's role under the approved plan. It is important to indicate the union's role so that it is not liable to any further complaint of discrimination under the Human Rights Act.

Revision of Union Contract

Both employers and unions are responsible for compliance with provisions of the Human Rights Act. An employer may not blame failure to take affirmative action on barriers in a union contract or threat of a suit if such action is taken. Legally, a union is obligated to revise any contract provisions which have discriminatory effects, regardless of membership preference. If a union is unwilling to negotiate such changes, they should be made unilaterally by the employer. Such unilateral action to comply with the Human Rights Act does not violate the "good faith bargaining" provisions of the provincial labour relations legislation. Some specific issues include:

1. Union Membership - Membership in unions must be open without discrimination.
2. Union Referrals - Referrals by unions must likewise be made without discrimination for all jobs.
3. Seniority Systems - Seniority systems which perpetuate a discriminatory effect on formerly excluded or segregated classes must be changed.

Affirmative Action Plan to Address all "Terms and Conditions" of Employment - (to combat in particular "institutionalized or systemic discrimination")

After a need for affirmative action has been recognized and after having secured the support of the company, the task then becomes one of designing the best possible plan for the situation at hand. However, most human rights agencies would probably require that the contents of an affirmative action plan be directed to all terms and conditions of employment where discrimination could be perceived either directly or systemically. Again although the style and format of affirmative action plans may vary considerably from one employer to another, and from province to province, the basic substance will generally be the same. The Human Rights Commission after having examined the pre-employment activities of the affirmative action plan and the roles of the recruiter, employment agencies, trade union and professional association, will look to the on-the-job conditions of employment. Therefore, the affirmative action plan will need to specify for the human rights commission the following:

Promotion

The affirmative action plan will need to ensure that promotion is not faced with obstacles or barriers that discriminate against the minorities or women. The human rights legislation proscribes such discrimination and upon this

basis work can be done to remove such barriers. Steps to be taken might include a review of the company's formal and informal promotion practices. Where the affirmative action plan is resulting from a human rights commission inquiry into a complaint, the data is readily available to the investigating human rights officer. In conducting an analysis of upward mobility of women and minorities in the organization the following steps outlined by the EEOC[1] in their guide might be followed:

1. Identify the barriers - First, identify barriers to upward mobility of minorities and females.
   a. Present System - Determine present systems or practices affecting transfer and promotion, both formal and informal.
   b. Requirements - Identify requirements and procedures for transfer and promotion.
   c. Supervisor's Influence - Determine the extent to which supervisors' evaluations and recommendations are a major factor in transfer and promotion.
   d. Effect on Minorities and Females - Determine whether requirements for selecting apprentices and special bidding procedures for incumbent workers have disparate effect on minorities and females or tend to lock out members of a protected class.
2. Develop Affirmative Action Records to Monitor Upward Mobility

   Records are needed to identify existing barriers and

1. cf. Equal Employment Opportunities Commission, "Affirmative Action and Equal Employment, A Guidebook for Employers" Washington, D.C., 1973.

determine needed affirmative action for upward mobility.

a. Records - At least the following records should be maintained:

(1) Personnel Transactions - Promotion, transfer and termination rates for each minority group and for females, by job category, compared to other employees.

(2) Training - Number and percentage of each minority group and of females in apprenticeship and all training programs.

(3) Progression - Charts showing formal lines of progression.

b. Analysis - At least the following analysis should be made:

(1) Upward Mobility - Identify jobs held by minorities and females in terms of job progression and opportunities for upward mobility compared to to other employees.

(2) Promotion Referrals - Compare rate of minorities and females who are referred for promotion but not promoted to that of other employees.

(3) Barriers - Identify seniority and other factors which operate as barriers to upward mobility for minorities and females.

(4) Experience and other Requirements - Determine if

present requirements for work experience in entry jobs are necessary to perform the next job in formal lines of progression or merely convenient means of qualification for promotion. Determine how much time is really needed to gain work experience for promotion.

3. Develop Affirmative Programs to Overcome Identified Barriers

Take remedial affirmative action to eliminate barriers and overcome the effects of past discrimination.

a. Selection Guidelines - Be sure that all selection standards and procedures for promotion, transfer and training conform to any Human Rights Commission guidelines.

b. Employee Ability - Be sure that procedures for selecting candidates for promotion, transfer and training are based on fair assessment of an employee's ability and work record.

c. Merit System - Adopt a company-wide merit promotion plan; post and otherwise publicize all job promotional opportunities and encourage employees to bid on them, particularly employees who traditionally have not had access to better jobs.

d. Employee Evaluation - Develop a formal employee evaluation program, based on objective, measurable factors.

e. Supervisory Responsibility - Require supervisors to include a specified percentage of minorities and females among those promoted, consistent with annual affirmative action goals. Require supervisors to submit a written justification when apparently qualified employees are passed over for upgrading or promotion.

f. Promotion Eligibility - Make clear to employees and supervisors that women and minorities are eligible for promotion to any job, on the basis of individual qualifications, regardless of whether some jobs have traditionally been held by one sex or race.

g. Remedial Action - Locate members of any identified "affected class" for priority remedial action in transfer, promotion or relevant compensatory benefits and pay. Identify minorities and females qualified for upward mobility.

(1) Qualifications Comparison - Review all records of all employees and analyze comparative qualifications.

(2) Potential Assessment - Interview employees to further assess their potential and get additional information on their background and career interests. Women and minorities currently in your work force are often a major undeveloped

resource for administrative, technical, managerial and professional jobs.

(3) Employee Comparison - Compare job performance, length of service and other factors affecting salaries and promotion rates of minority and female employees with qualifications of other employees who have been promoted.

(4) Remedial Action Files - Set up a remedial action file of minority and female employees qualified for promotion and use this file first when openings occur in job classifications.

h. Career Counselling - Establish a career counselling program, to encourage employees in dead-end jobs to qualify for better jobs.

i. Cooperative Programs - Provide training at the job site through cooperation with local training and education institutions.

j. Job Restructuring - Consider restructuring jobs to reduce the gap and increase the steps between present low-skill and higher-skill jobs.

Training

As a condition of employment, training opportunity should be accessable to all without regard to race, sex, etc., in order to not violate provincial human rights legislation. As a vital area of progress for the minorities and women, any

affirmative action plan will need to address training procedures, and selection of employees for training if the plan is to be successful.

The kinds of questions which the affirmative action officer can ask relative to the training picture of the organization might include: "Do eligibility requirements for training exclude minorities or women?" "Who is responsible for deciding on who gets training?" "Is there in place a system whereby all employees can make known their interest in training?"

Some of the practical steps to be taken include: (a) Set specific numerical or percentage training goals of participation of minorities and females in all company sponsored training,

(b) Identify training programmes available through Employment and Immigration Canada or the provincial government programmes, which may assist in achieving company's affirmative action goals.

(c) Management training should be a high priority in view of the very small number of minority and female managers.

(d) Determine how new training programmes can be developed and utilized to help those who have not had the opportunity to acquire on-the-job experience to qualify and compete for promotions.

Equal Pay for Work of Equal Value

Insofar as the human rights legislation is very explicit in requiring that equal pay is mandatory notwithstanding the race, sex, religion, etc. of the employees, it is not a negotiable item in any affirmative action plan.

A problem area might be in the physically handicapped area. Instances of "special" programmes of the "sheltered workshop" type have been instituted for groups such as the mentally retarded, and sometimes the remuneration may be a subject of concern for human rights and labour standards agencies.

Employee Benefit Packages

A review of all benefits can be made within the purview of the human rights legislation as indicated above. Within the context of the development of an affirmative action programme the following steps are recommended:

1. Employee Benefits

   a. Retirement Plans - Assure that men and women are eligible for retirement and pensions on the same basis, including equal retirement age and equal benefits.

   b. Conditional Benefits - Assure that benefits are not conditioned on the basis that the employee is "head of the household" or "principal wage earner" (such a condition is not job related and tends to discriminate

against females).

c. Family Benefits - Assure that benefits for husbands and families of female employees are the same as those available to wives and families of male employees.

d. Female Employees - Assure that benefits available to wives of male employees are available to female employees for their

e. Utilize where available the "Guidelines" of the appropriate human rights commission.

2. Provincial and Federal Labour Standards Law

Most of the "protective legislation" from an earlier generation has been repealed. Industrial safety legislation may need to be carefully examined and might identify areas of remnants of the earlier philosophy. Recommendations for legislative amendment may be warranted, and ought to be guided by concern for the safety of all workers.

3. Maternity Leave Legislation

The maternity leave legislation of the given jurisdiction where an affirmative action plan is being developed must be understood and provided for in the plan design. The plan should also be structured in such a manner as to ensure maximum benefit from the various federal assistance programs.

Layoff, Recall, Discharge, Demotion, Disciplinary Action

Human rights legislation in Canada prohibits employers or any other person from laying off, discharging, or otherwise effecting the terms and conditions of an employee's employment in a discriminatory manner. In order to facilitate an affirmative action plan with regard to this area the following records should be kept and made available as necessary to the human rights commission for monitoring purposes:

1. Terminations - Records of all terminations should be kept indicating total, name, date, number of men and women in each minority group by job category and reason for termination.
2. Layoffs and Demotions - Records of layoffs and demotions should be kept indicating total, name, date, number of men and women in each minority group by job category, reason for action and recall rights.
3. Exit Interviews - Exit interviews should be conducted with all employees who quit to determine to what extent lack of training and actual or perceived discriminatory treatment are causes of turnover.
4. Layoff - Where minorities or females previously could not enter certain job categories, and therefore acquire job or departmental seniority, have held that total company seniority must be retained for layoff and recall purposes.

Application by a Person to Human Rights Commission for an Approved Plan

The affirmative action officer should make direct contact with the human rights agency in his area as soon as the officer is on location. This contact will afford the officer an opportunity to learn of the special procedures of the province with regard to any required approval of an affirmative action plan.

Contents of Application

Although the style and format of affirmative action plans may vary considerably from one employer to another, and from one province to another, and depending on the target group, the basic substance will generally be the same. The written plan application should include:

1. A written policy statement prohibiting discrimination on the basis of religion, race, color, national origin, age, sex, marital status or handicap in all phases of employment.
2. An analysis of the jurisdictions, present work force, and labor market.
3. For each personnel program component (e.g., recruitment, selection, appointment, placement, training, upward mobility and other personnel actions) a detailed narrative statement setting forth in some order:
    a. present policies and practices
    b. the findings (including charts and tables presenting

appropriate data) resulting from the review and evaluation of the application and effects of those policies and practices, and

c. the specific objectives or goals planned to accomplish improvement in any problem area including:

(i) the specific action steps or methods to be used in achieving the objectives,

(ii) the assignment of responsibility to individuals or organizational units for carrying out the action steps,

(iii) specific, realistic and achievable timetables and target dates, and

(iv) a description of the procedure to be used in the monitoring and evaluation of progress toward achieving the objective.

4. A detailed description of:

a. how the affirmative action plan was developed

b. how the affirmative action plan will be communicated to employees and to appropriate outside individuals and organizations

c. how the affirmative action plan will be implemented and maintained, including the individual(s) responsible and the commitment of funds, staff and other resources.

5. A specific method, including dates and timetables, for periodic evaluation, review, revision and updating of the

affirmative action plan and reporting to the human rights commission.

6. A procedure whereby employees and applicants are made aware of their right to complain to the human rights commission if there is a violation of the Act. Also needed is the procedure whereby in like manner the company receives the protection of the human rights commission from the allegation of discrimination for something done pursuant to the approved affirmative action plan.

An Affirmative Action Plan as a Term of Complaint Settlement

An affirmative action worker who becomes involved with the human rights commission in attempting to effect a settlement of a complaint needs to recall the role of conciliation as distinct from that of investigation.

When conciliation is making significant progress, the question of the respondent employer adopting an affirmative action plan can be raised. In some situations the respondent may be well informed of the nature of affirmative action plans and might welcome the idea of instituting such a plan within his organization. In this situation the services of affirmative action workers should be made available together with the appropriate services of other collaborating agencies.

In other circumstances the affirmative action worker along with the human rights officer might be faced with an array of mistaken notions about affirmative action held by the employer. At this time, the affirmative action worker

has the opportunity and challenge to explain and perhaps "defend" the concept of affirmative action in the face of the employer's questions.

An important legislative development in this regard is the provision in the Saskatchewan Human Rights legislation which gives that province's Human Rights Commission the authority to order an Affirmative Action Programme.

Role of Human Rights Commission in Monitoring an Approved Plan

Where the human rights commission gives approval to a plan, it will be helpful if the commission would advertise the fact of this approval in the community where the plan is to be implemented. This will help in avoiding any complaints.

The approval of an affirmative action plan probably carries with it the right to monitor the given plan. In Saskatchewan and New Brunswick the legislation specifically provides the human rights commission with the discretion of making inquiries, varying, imposing conditions or withdrawing approval of an approved affirmative action programme.

In order to meet its responsibility to monitor an approved affirmative action plan, the human rights commission will require an adequate reporting system to be set in place. The design and setting in place of this required reporting system will be a key element of an affirmative action plan.

Much of the basic data required have been covered above, that is: Survey of Present Employment, Pre-employment

activities, Promotion, and Terms and Conditions of Employment.

Annual Reports. Based on the developed data and program plans, the company should make available with the assistance of the Affirmative Action Officer, reports on a regular basis. These reports would not only be useful to the company but would also help the commission in monitoring or evaluating the progress made, seeing how the plan is working, and where improvement is needed.

The annual reports on the affirmative action plan should indicate the following:

1. Applicant flow by race, sex and source.
2. New employees, job classification, race and sex.
3. Rejections by race and sex and the reason for those rejections.
4. Promotion, job classification, race and sex.
5. Turnover, job classification, race, sex, and the reason for turnover (e.g., dismissal, resignation, job elimination, etc.)
6. Employee participation in organization training programs by program, division, race and sex.
7. Employees hired through special programs for the unemployed by program, job classification, race, sex and their retention rate.
8. Changes in composition of the organization work force, type of job and level of management as these relate to

the affirmative action plan goals.

9. Changes being made to the affirmative action plan as a result of the activities during the reporting year.